REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1914, JANUARY TERM, 1915.

VOLUME XCVII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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[1] January 7, 1915, Conrad Hollenbeck succeeded Manoah B. Reese as Chief Justice.
[1] January 21, 1915, Chief Justice Hollenbeck died.
[2] January 21, 1915, to January 25, 1915, Jacob Fawcett was Acting Chief Justice.
[3] January 25, 1915, Andrew M. Morrissey was appointed Chief Justice.
[4] Until January 7, 1915.
[5] January 7, 1915.
[6] January 16, 1915.
[7] January 26, 1915, Dexter T. Barrett succeeded Andrew M. Morrissey.
[8] January 26, 1915.

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NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper.....	Pawnee City.
Second.....	Cass, Otoe and Sarpy....	James T. Begley....	Papillion.
Third.....	Lancaster.....	Albert J. Cornish....	Lincoln.
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		Willard E. Stewart...	Lincoln.
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		James P. English....	Omaha.
		Lee S. Estelle.....	Omaha.
		Charles Leslie.....	Omaha.
		William A. Redick...	Omaha.
		Willis G. Sears.....	Tekamah.
		Alexander C. Troup..	Omaha.
Fifth.....	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran...	York.
		Edward E. Good.....	Wahoo.
Sixth.....	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Frederick W. Button.	Fremont.
		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth.....	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna....	Greeley.
		James N. Paul.....	St. Paul.
Twelfth.....	Buffalo, Custer and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth...	Arthur, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, Logan and McPherson.	Hanson M. Grimes....	North Platte.
Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Ernest B. Perry.....	Cambridge.
Fifteenth.....	Boyd, Holt, Keya Paha and Rock.	R. R. Dickson.....	O'Neill.
Sixteenth.....	Brown, Box Butte, Cherry, Dawes, Sheridan and Sioux.	William H. Westover	Rushville.
Seventeenth..	Banner, Garden, Morrill and Scott's Bluff.	Ralph W. Hobart....	Mitchell.
Eighteenth...	Gage and Jefferson.....	Leander M. Pemberton.....	Beatrice.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1914.

JOHN E. DENOON, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,785.

1. **Appeal:** FINDINGS: CONFLICTING EVIDENCE. In an action at law and upon a trial by a jury, all questions of fact upon conflicting evidence, upon which reasonable minds might differ, are for the consideration of the jury, and their finding will ordinarily be considered as final.
2. **Street Railways:** INJURIES TO PEDESTRIANS: NEGLIGENCE: QUESTION FOR JURY. Plaintiff sought to cross a street upon which there was a double line of street car tracks. As he started across the street and tracks, a street car was slowly approaching, crossing another street, with the evident purpose that the car should be stopped for receiving and discharging passengers. Another street car was approaching the same crossing on the track nearest to plaintiff. Plaintiff, supposing that the car first referred to would make its stop in the usual way, leaving the crossing clear so that he could safely cross both tracks to the opposite side of the street, proceeded on his way, safely crossing the first track, but the car stopped and stood across his way, and, in order to cross, it became necessary for him to wait for the car to move on, or change his course and pass into the cross street around the rear of the car. At that time the car going in the opposite direction was close upon him, pursuing its way toward the opposite side of the cross street, or further on if not flagged. The space between the passing cars was some 15 or 16 inches in width. He stood close to and against the car which had stopped on the crossing, but the passing car struck him, inflicting injuries. In an action by him for the resulting damages, it is *held* that, under the circumstances, the questions of defendant's negligence and of plaintiff's contributory negligence were questions of fact to be passed upon by the jury.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

C. S. Allen, F. E. Bishop and *O. B. Clark,* for appellant.

Morning & Ledwith, contra.

REESE, C. J.

This is an action against the Lincoln Traction Company for personal injuries alleged to have been received by plaintiff by being struck by one of defendant's cars, and injured, at the street crossing on Twelfth and O streets in the city of Lincoln. The pleadings are in the usual form, plaintiff charging negligence on the part of defendant, and defendant denying negligence, but charging contributory negligence on the part of plaintiff. As no question is raised on the pleadings, they need not be stated. The prayer of the petition asks judgment for $10,000. There was a jury trial, which resulted in a verdict and judgment in favor of plaintiff for $1,000. Defendant appeals.

The facts, as alleged by both parties and substantially proved, are that there is a double street car track running east and west on O street crossing Twelfth street, and a single track running north and south on Twelfth street, the tracks being in the middle of the streets. Plaintiff was walking south on the east side of Twelfth street, approaching O street for the purpose of crossing to the south side. As he entered O street on the foot crossing, there was a car going east just crossing Twelfth street, and which would, and did, stop at the farther or east side for the purpose of receiving and discharging passengers. At the same time a street car, going west, was approaching from the east about one-half block away. Plaintiff, supposing the car going east, and which was in the act of stopping, would pass the foot walk in the usual way, and thinking he would have ample time to cross the tracks before the west moving car would reach the crossing, started to cross the street, but, after crossing the north track, discovered

that the east moving car had stopped directly on the crosswalk, so that in order to pursue his way he would have to walk around the rear end of the car into Twelfth street. Just then he observed the west moving car was approaching at what he alleges and testifies was a high rate of speed, and which would not give him sufficient time to retrace his steps or to pass around the rear of the other car. He stopped, and crowded up to the standing car in order that the west running car might pass by without striking him. The passing car struck him, rolling him between the cars to the rear of the car headed to the eastward, when he was thrown to the ground and rolled on the pavement some distance by the west moving car, receiving the injuries complained of.

With the exception of the question of the rate of speed of the west moving car at the time it struck plaintiff, there is little conflict in the evidence. It is conceded that, had the car headed for the east not stopped upon the crosswalk, and thus prevented plaintiff from passing, he would have had sufficient time to cross both tracks to safety, but it is insisted that the fact that the car stopped on and across the crosswalk is no evidence of negligence. The distance between the two tracks is about 4½ feet, and the distance between the two cars in passing is about 15 or 16 inches. There are few questions of law presented. As the case was submitted to the jury, it presented the issues: Was the westbound car, which struck plaintiff, running at a high or dangerous rate of speed, under the circumstances? As we have seen, there was a conflict in the evidence as to this, and the question was for the jury. Was defendant guilty of negligence in stopping its eastbound car as it did, with about the middle of the car over the crosswalk, those in charge knowing that another car would pass it in going in the opposite direction, and that persons would be crossing the street at that time? This question was also for the jury. Was plaintiff guilty of contributory negligence in presuming that the crosswalk would be cleared, and in trying to cross the street as he did? If the court could not say that his act was so

reckless as to render him guilty of contributory negligence as matter of law, the question would also be for the jury under proper instructions by the court. These propositions are too well-settled to require the citation of authorities in their support. All questions of fact upon which reasonable minds might differ must be solved by the jury. *McLean v. Omaha & C. B. R. & B. Co.*, 72 Neb. 450. This we take it is the settled law.

Defendant asked the court to instruct the jury as follows: "You are instructed that the operation of the eastbound car was not negligent under the circumstances in the case. Whether the car stopped with the rear platform over the crossing or west of the crossing is immaterial, and you will find for the defendant on the issue of negligence in the operation of this car." The court refused to give the instruction, and the refusal is assigned as error. It is argued with considerable force that the fact of stopping at the point named cannot be held to be negligent; that defendant has the right to stop its cars "at any place on the track." As an abstract proposition, this is probably true, but, when considered in the concrete, the circumstances must be taken into consideration. As an extreme case, suppose a fire department is called out in an emergent case, and in making the run it is necessary to cross a street car track, has the street car company the right to stop its cars directly in the way of the fire department, standing its car directly in the road, thus preventing the department from crossing? The argument claims too much. While a car "may be lawfully stopped at any place on the track," as a general rule, yet the rights and safety of others must be considered. While, by a segregation and division of the evidence, we might conclude that defendant had the *right* to stop and hold its car as it pleased, without negligence, and, if the testimony of the motorman is true, there was no negligence in the speed of his car, we might consider that defendant was free from negligence, but, if all the circumstances chargeable to defendant in the management of both cars are to be considered, different conclusions might be arrived at, and that defendant should

be held liable; all of which goes to demonstrate that the questions presented were for the consideration of the jury. The court, therefore, did not err in refusing to give the instruction asked.

So far as the record discloses, the case was properly submitted to the jury, under proper instructions, and we are unable to detect any error prejudicial to defendant.

The judgment of the district court is therefore

AFFIRMED.

LOUIS FINK V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1914. NO. 18,617.

Assault: SUFFICIENCY OF EVIDENCE. The evidence, substantially set out in the opinion, is examined, and *held* insufficient to sustain a conviction of assault.

ERROR to the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

A. D. McCandless, for plaintiff in error.

Grant G. Martin, Attorney General, Frank E. Edgerton and *Jean Cobbey, contra.*

REESE, C. J.

A complaint was filed in justice court in Gage county charging that plaintiff in error, who will hereafter be referred to as defendant, on the 6th day of November, 1913, "unlawfully and maliciously did assault and threaten in a menacing manner to shoot and kill one Anna Harms." A trial was had before the justice, who found defendant guilty as charged, and imposed a fine of $50, with $46.60 costs, and adjudged that he stand committed until the fine and costs were paid. He appealed to the district court, where a trial was had in which the court instructed the jury in effect that the prosecution was for an assault only. The jury found defendant "guilty as charged." Af-

ter the filing of a motion for a new trial and the overruling of the same, the court sentenced the defendant to pay a fine of $25, and the costs of prosecution, taxed at $82.30. Defendant brings error.

It is contended that the court, in its instructions, and after the introduction of the evidence, erred in limiting the prosecution to a simple assault. We can see nothing in this which could be of any prejudice to defendant. So far as the instructions of the court to the jury are concerned, we can see no cause for complaint.

The principal contention of defendant is that the evidence is insufficient to sustain a verdict of guilty of even an unlawful assault. At the time of the alleged assault, defendant was between 82 and 83 years of age. He owned a farm near Wymore, upon which were two houses, barns, etc., some distance apart, in one of which houses defendant resided, the other being occupied by Harms, who was his tenant. Defendant procured his son-in-law Mr. Betting, who resided in Kansas, to come upon the farm, take charge of its management to some extent at least, and remain thereon. On the day before the alleged assault, defendant and his son-in-law Betting met Harms, and defendant informed Harms that Betting was there looking after defendant's interests on the farm, and to which Harms assented by saying, "All right." Many of the material statements of the state's witnesses were contradicted by witnesses for the defense, but the testimony of the witnesses for the state alone will be here considered. Those witnesses were Harms, his wife, and their hired man, Lewis. Mrs. Harms testified that on the day before the altercation, Betting came to where she was digging potatoes. As what there occurred constitutes the basis for what followed next day, we copy the essential portion of Mrs. Harms' testimony: "Q. When did you first see him on that day? A. I seen him cross the yard in the morning, and about an hour and a half before or right after dinner I seen him go down towards our house, and in about an hour and a half I seen him standing right behind me. Q. You were busy digging potatoes at that time? A. Yes,

sir. * * * Q. Did you hear him approach? A. When I looked up and saw him, he said, 'How do you do,' and I said, 'How do you do,' and he said, 'Getting any potatoes?' and I said, 'No,' and he asked me whether I tried to raise potatoes on that ground before, and I told him, 'No,' and he began and examined the potatoes in the bucket, and he said, 'Late potatoes?' and I told him I didn't know what kind of potatoes they were. He examined the potatoes in my bucket, and he said, 'Yes, they are late potatoes,' and I told him I didn't know what kind they were, and he talked on, and said, 'Is this all the potatoes you have got?' I didn't answer that, and he walked off to the creek bank, and he stood there 10 or 15 minutes with his hands in his pockets and his cap pulled over his eyes doing nothing in particular; he was looking down the creek." She states that it frightened her when she first saw him. "I told Mr. Harms that evening that if that fellow was coming around every time I went outside and follow me around I wasn't going to stay there." It must be observed that no word was spoken by Mr. Betting, nor was there any act upon his part, which could give the least offense to any lady, nor did he, by word or act, violate the most stringent rules of decorum and politeness. When we consider that he had but a day or two before entered upon his duties to take charge of the management of the farm, it was but natural that he should examine the land and learn what he could as to its quality and what it could produce. It may be that at that time Mrs. Harms may not have known of Betting's relation to Fink, or to the land, but her husband did, and if she made the complaint to him that evening, as testified by her, it would be but natural for him to give to his wife the information which he possessed. There is a presumption that he did, but that is not material, for he well knew of the fact. There is a small artificial lake upon defendant's farm, which, as was his daily custom, defendant visited morning and evening. The next morning early, and without any knowledge of what had passed between Harms and his wife the evening before, he and Betting started to the lake, and, as

ducks sometimes visited its waters, he took his gun with him for the purpose of shooting, if any ducks were there. The road passed by the part of the farm occupied by Harms, his tenant, and the two men were walking orderly on their way. Mrs. Harms saw them approaching and went to where her husband and Lewis were. She says in her testimony: "I knew that Mr. Harms was going to ask this fellow who he was and what business he had around there." Harms did know who he was and his business there. Mrs. Harms knew that an altercation was to be had, and of which defendant and Betting were wholly ignorant. When their approach was discovered, Harms waited for them to come to where he was, when he stepped toward Betting, and asked him, whose slave driver he was, and to explain what business he had there. It appears from the evidence that Betting was an invalid, and defendant presented his gun and said, "Stand back, or I will shoot." Lewis ordered him to "put up" the gun, and he pointed it at Lewis. Mrs. Harms appears to have been standing behind her husband, and at that time she stepped around and said: "What do you mean by hiring strange men to follow me about the place?" when defendant presented the gun toward her. Just then Lewis spoke up and said, "Fred, that is plenty. You can have him pulled for that." Nothing further was said or done. Mrs. Harms testified that, when Harms walked up to Betting and asked him whose slave driver he was, he was shaking his finger at Betting. There can be no possible doubt, from the actions of the Harms party, that the three were there for an unlawful purpose, viz., that of assaulting a man over 82 years of age and his invalid son-in-law, but with no possible excuse therefor. The first salutation, "Whose slave driver are you," was calculated to provoke trouble, and was no doubt intended for that purpose. Mrs. Harms testified that the episode in the potato patch was the only time Betting had ever accosted her, and that he had never at any other time "followed her around." Defendant, no doubt realizing his inability at his infirm age to cope with the three, scared them off with the only weapon he is

shown to have had, and when they retreated, or as Mrs. Harms expressed, "backed off," he passed on his way, Lewis remarking "That is plenty. You can have him pulled for that." It is not contended that defendant made any attempt to shoot any one. His act was at all times purely defensive. He did not seek the quarrel and never at any time sought to prolong it. The witnesses say he used rough language to them as he presented the gun. The two combined seem to have had the intended effect of scaring off his assailants, which was all he ever tried to do. The testimony on the part of the defense presented a different contention, but we do not base our conclusion upon any conflict in the evidence. If every word stated by the witnesses for the state is true, there was nothing more than an effective defense offered by defendant, and there was nothing upon which a conviction can rest.

The verdict and judgment are set aside, and the cause is remanded.

REVERSED.

ROSE, J., not sitting.

ALFRED E. HAYWARD V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1914. No. 18,645.

1. **Burglary:** SUFFICIENCY OF EVIDENCE. The evidence, the substance of which is stated in the opinion, is *held* insufficient to sustain a conviction of burglary.
2. **Instructons** 6 and 7, copied in the opinion, *held* to have been erroneously given.

ERROR to the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Morning & Ledwith and *Bruce Fullerton* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

An information was filed in the district court charging plaintiff in error, who will hereafter be referred to as defendant, with the crime of burglary, by breaking and entering into a public building in the city of Lincoln, known as the "Young Men's Christian Association Building," with the intent to steal property of value therein. A jury trial was had, which resulted in a verdict of guilty, when he was sentenced to pay a fine of $300 and the costs of prosecution, and that he be imprisoned until the fine and costs were paid. He brings the case to this court by proceedings in error; his principal contentions being that the court erred in certain instructions, and that the evidence is insufficient to sustain a conviction.

The evidence shows that there is a telephone booth situated in the office or the lobby of the building referred to, and that the first that was noticed of defendant being present was when he applied to the person in charge, at the clerk's counter, and asked that the fan, which was running in the booth, be turned off, which was done, and the fan stopped. The defendant entered the booth as though for the purpose of telephoning to some one. The money drawer in the booth cabinet was connected by a secret wire to an instrument, termed a "buzzer," at the clerk's desk, so as to set in motion said buzzer upon the opening of the money drawer. The buzzer gave an alarm, when two of the men in charge hastened to the booth and found defendant therein, apparently in the act of telephoning to some one, the money drawer open with a key protruding from the keyhole in the lock therein. The contention on the part of the state is that defendant must have broken into the main building, as all the doors by which an entry could have been made were equipped with strong springs, which automatically closed the doors upon any one passing through and releasing the open doors. There were no locks nor latches on the doors, they being held closed by the springs. While there is no direct evidence as to how or by what method defendant gained access, it is contended that he must have pushed open one

of the swinging doors, and thus made his entrance to the lobby; the assumption being that such entry was with felonious intent. There was evidence that another drawer of the same kind, in another building, was opened that afternoon, a short time before defendant's appearance in the lobby, and money extracted; certain marked coins having been taken therefrom and found on his person at the time of his arrest. This evidence was competent for the purpose of showing, as a circumstance, his intent to steal. It is fundamental that, in order to prove burglary, there must be evidence tending to prove the unlawful breaking and entry, and that such unlawful acts were with felonious intent, as described in section 8643, Rev. St. 1913. The act of breaking may be shown by proof, either direct or circumstantial. The breaking may be by the mere pushing open of a closed door, even though unlatched or unlocked; but there must be proof of the breaking. The breaking must be accompanied by an unlawful intent; if not, it is not burglary. This intent may also be proved by direct or circumstantial evidence. If the criminal intent or purpose is not formed at or before the entry, it is not burglary. The intent must be accompanied by the act of breaking and entry. These rules are fundamental and well understood, are included in the statute, and the citation of authorities in their support is not necessary. It is also well understood that every material element of a crime charged must be proved beyond a reasonable doubt. The jury were so instructed in this case.

The Young Men's Christian Association Building is a public building. In a sense it is similar to a hotel. The public is invited to enter. Meals are furnished at specified rates for all who may desire them. While nothing was stolen, it is contended that an attempt to rifle the money drawer was made, and that defendant was frustrated in the attempt. This might be true, and yet he may have been innocent of the breaking. The evidence shows that defendant was within the booth about 7 o'clock P. M.; that he had prior to that time asked to have the fan turned off, and no one testified to any knowledge of when or how

he entered the building. It is to be presumed that it was some minutes before he entered the booth. The evidence is that from 6 to 7:30 o'clock in the afternoon about 500 people enter the building, passing through the doors. It must be that, in such a rush, many pass through an open doorway, the spring door being held open by those passing through. The evidence tends to show that defendant entered during that time. Did he open the door to make the entry, or did he pass through an open doorway? There is no hint in the evidence upon this subject. When two equal presumptions—one in favor of innocence, the other in favor of guilt—are presented, the one in favor of innocence is to be preferred and applied. In this regard the evidence fails to establish defendant's guilt beyond a reasonable doubt.

Complaint is made of instructions numbered 6 and 7, given to the jury by the court. They are here copied.

No. 6. "It is a familiar principle that a 'breaking' necessary to constitute the crime of burglary may be any act of physical force, however slight, by which the obstruction to the entering is removed. The lifting of a hook with which a door is fastened, or the opening of a closed door in order to enter a building, is 'breaking' within the accepted definition of burglary, although the entry might have been effected through a door already open."

No. 7. "The jury are further instructed that, if in this case you believe beyond a reasonable doubt that the accused, Hayward, entered the building without unlocking the door, or without using force in opening a door so as to enter, then you will find defendant not guilty, and will acquit him of the crime charged."

The principal objection to the sixth instruction is to the closing or last clause thereof, to wit, "although the entry might have been effected through a door already open." It must be conceded that the language might tend to leave one in doubt as to its meaning. If it meant that defendant would be guilty if he entered through an open door, the instruction is clearly wrong, for in that case there would be no "breaking." If it meant that the fact the

other doors were open and defendant broke in through a closed door it would be breaking, the instruction would not be objectionable. In any event the instruction is ambiguous, and should not have been given in the form adopted.

The seventh instruction was, no doubt, an oversight on the part of the court, for it reverses the rule of law applicable to the case. It was not necessary for the jury to believe beyond a reasonable doubt that defendant had not done the things charged in order to acquit him. The instruction is clearly erroneous. *Flege v. State,* 93 Neb. 610.

The judgment of the district court is reversed and the cause is remanded.

REVERSED.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

There is nothing in the point that the Young Men's Christian Association Building was a public building and that from 6 to 7:30 in the evening a large number of people passed through the doors into the building. People who so pass into the building do so by invitation of the Young Men's Christian Association for lawful purposes. This invitation does not extend to one who desires to enter for the commission of a larceny. That the defendant entered the building for the purpose of committing a larceny is established beyond a reasonable doubt. The uncontradicted testimony shows that on the afternoon and evening in question the doors of the building were closed. Defendant entered the building through the door. There was no other way he could enter. In order to gain an entrance through the door, every reasonable probability is that he opened the door himself. No one saw him enter, and so it is held, in the majority opinion, that there is no proof of a forcible entry, so as to make the crime burglary. In order to reach this conclusion, the improbable presumption is drawn that some one, who was lawfully entering, may have preceded the defendant into the building and

held the door open for him to enter. While such a circumstance is possible, it is too remote a probability to warrant the setting aside of the conviction of a man who, the evidence shows beyond a reasonable doubt, upon any reasonable hypothesis, is guilty of the crime charged. If criminals can thus escape their just deserts, then verily the proverb, "The way of the transgressor is hard," is reversed.

Instruction No. 6 could not by any possibility have prejudiced the defendant.

Instruction No. 7, quoted in the opinion, standing alone, might be held to have been prejudicial; but, when taken in connection with No. 8, which immediately follows it, it is idle to claim that the defendant was prejudiced. Instruction No. 8 reads: "The jury is further instructed that, in order to find the defendant guilty of the charge of burglary, it is necessary for the state to establish that, at the time that defendant entered the Young Men's Christian Association Building, he had an intention of stealing property from said building, and that he forcibly broke into said building for the purpose of carrying out his intention to steal property from said building." This instruction clearly and properly told the jury what the state must prove to warrant a conviction, and, it following immediately after instruction No. 7, the jury could not have been misled.

The doors of the penitentiary should swing evenly. The outward swing is easy these days, and the inward swing should not be made too hard.

EMMET HILEMAN, APPELLEE, V. CHARLES H. MAXWELL, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,840.

1. **New Trial:** EVIDENCE. A new trial should be allowed, when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned.

2. **Compromise and Settlement:** CONSIDERATION. "Where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed.*

R. E. Evans, for appellant.

J. J. McAllister and *W. V. Steuteville, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Dakota county, in a suit brought by one Emmet Hileman against Charles H. Maxwell to recover the sum of $334.05, alleged to be due the plaintiff for work and labor by himself and team from the 3d day of April, 1907, to January 5, 1910. To plaintiff's petition defendant filed an answer, setting out certain payments made to plaintiff during the time he was employed, amounting to $559.15, and a claim against plaintiff for $430 alleged to be due defendant for feeding and housing certain domestic animals belonging to plaintiff during the time he was employed by defendant, and the cost of keeping plaintiff's team when it was not working. Defendant denied that plaintiff worked for him during all of the time mentioned in his petition, and alleged that during that time there were ten days in which the plaintiff performed no labor for the defendant. As a further defense defendant pleaded a settlement between himself and the plaintiff on January 5, 1910, in which it was found and agreed that the defendant owed the plaintiff the sum of $47.35; that plaintiff then and there paid defendant in full, by giving him $20 in cash and a check for $27.35, which plaintiff accepted, retained and cashed in full payment of all of his demands and claims against the defendant. The reply

put in issue the allegations of the answer. On the issues thus joined a trial resulted in a verdict and judgment for the plaintiff for the sum of $326.35, and the defendant has appealed.

It is defendant's contention that the verdict and judgment are not sustained by the evidence. It appears from the record, without dispute, that on the 3d day of April, 1907, the parties entered into an agreement whereby defendant employed the plaintiff to work for him about his place in town and on his farm near-by for $50 a month when he used his team, and $40 a month when he worked without his team; that plaintiff accepted such employment, and in a day or two commenced to work for the defendant. Shortly thereafter plaintiff asked the defendant if he could turn his domestic animals into defendant's yards and sheds, and defendant replied that he could do so, provided he would pay for the feed consumed by them. Some talk was had as to what such feed would be worth, and it was agreed that whatever the neighbors would say it was worth the plaintiff should pay the defendant. There is no disagreement as to the terms of the contracts. The testimony shows that there was a partial settlement between the parties on June 3, 1908, at which time the defendant owed the plaintiff $63. The parties were not agreed as to what plaintiff should pay defendant for feeding and housing his stock, and that matter was left open for further consideration. The plaintiff testified that he worked for defendant from June 3, 1908, to January 5, 1910, and that a greater part of that time he worked with his team. This defendant admitted, but showed that plaintiff lost ten days during that time, doing no work at all, and that for five months during his employment his team was not used in working for the defendant, and those facts were not disputed by the plaintiff. So it may be said that it was fairly established that plaintiff's wages for himself and his team amounted to the sum of $983, including the $63 due him at the June settlement of 1908. The testimony shows, without dispute, that defendant had paid the plaintiff the sum of $559.15, without allowing

anything for the feed and care furnished plaintiff for his stock. This would leave defendant indebted to plaintiff in the sum of $422.85.

It appears from the testimony that plaintiff had in defendant's yards two cows all of the time of his employment, three head of horses about two months, a mare and colt about 45 days, one colt from May 9, 1909, to January 5, 1910, two calves for November, 1909, two colts from October 20 to December 26, 1907, one mule for a month and a half, in April and May, 1907. Plaintiff's animals were fed hay, alfalfa, kafir-corn, grain, corn, and straw. In fact, they were fed and cared for the same as was defendant's own stock. In addition to this, defendant fed plaintiff's team five months during which time plaintiff did not work them for the defendant. Plaintiff by his own testimony fixed the value of the feed furnished his stock at the sum of $146.50. This would leave as a balance due him the sum of $276.35, while the verdict and judgment in his favor was for $326.35. We find from the bill of exceptions, however, that plaintiff furnished no competent evidence of the value of the feed and care furnished by defendant for his stock. No witness testified for him on that question, and his own evidence was clearly incompetent. He testified at first that he did not know what the feed was worth, and after an adjournment he stated he knew what some of it was worth, and so the only competent evidence on that point was the testimony of the defendant's witnesses, who were farmers, and knew the value of the feed and care for such animals as plaintiff testified had been kept and fed in defendant's yards, barns, and sheds. The lowest amount, according to the testimony of defendant's witnesses, which the plaintiff should pay the defendant, was $348.75. This, if the jury had regarded the evidence, would have entitled the defendant to a verdict of something like $72.40. It thus appears beyond all question that the verdict and judgment were not sustained by plaintiff's own evidence. We are therefore constrained to hold that defendant's contention on this point should be sustained.

On the question of the final settlement between the parties, the evidence shows that plaintiff asked the defendant for a settlement. They took their books and went over the matter, and it was found that defendant owed the plaintiff $47.35. Defendant testified that he asked the plaintiff if he wanted his money, and he said he did; that he thereupon paid the plaintiff by giving him a $20 bill, which he had in his pocket, and a check on the bank for $27.35, on the face of which he plainly wrote "Bal. in full to date;" that plaintiff accepted the check, retained it some little time, and cashed it. This the plaintiff admitted, and the check was introduced in evidence; but the plaintiff claimed that he did not read the check, and did not see the plainly written statement thereon that it was the payment of the balance due him in full.

Defendant produced one J. P. Rockwell as a witness in his behalf, who testified that he was well acquainted with both parties to the transaction, and that soon after the 5th day of January, 1910, the plaintiff told him that he had quit working for Maxwell. He said he was somewhat disappointed; that he did not get as much money as he expected; that he expected to do some things that he could not do because he did not get as much money as he expected when they settled; that Maxwell did not owe him as much, according to the settlement, as he expected; that he did not think the settlement was right; that he was not satisfied with it; and that he was not going to stand by it. On cross-examination witness said, in substance, that plaintiff stated that Maxwell charged him too much for keeping his stock. The plaintiff testified that no such conversation occurred between himself and the witness Rockwell. His only explanation of why he retained the check and cashed it was that he did not see the indorsement of "payment in full" which appeared upon the face of the check itself. Upon this branch of the case it is clear that the jury paid no attention whatever to the evidence.

It is contended by the defendant that, plaintiff having received and accepted the check and the $20 in cash, such

payment should be held to be a complete satisfaction of the matter in controversy. In support of this contention counsel for the defendant cites a large number of cases, among which is found *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396, *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334, and *Treat v. Price*, 47 Neb. 875.

In the first of these cases it was said: "Where a certain amount of money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary." It was further held in that case: "When there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." This rule was also announced in *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334.

In *Treat v. Price*, 47 Neb. 875, it was said: "The rule that when a certain sum is due from one to another, the payment of a lesser sum is no discharge as to the remainder, notwithstanding an agreement to that effect, is founded upon the fact that the latter agreement is without consideration. Such rule does not apply where the amount due is disputed or unliquidated." It was further held: "Where a certain sum of money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary."

This rule seems to be well settled by the great weight of authority. In opposition to this rule the plaintiff has directed our attention to *Rapp v. Giddings*, 4 S. Dak. 492. In that case it was said: "Where payment is made by check, which recites on its face, 'in full of all demands,' such words will constitute a receipt in full, as against the payee, only when it is shown that he had knowledge of the presence of such words, or facts are shown which in law would charge him with such knowledge." Counsel also cites *National Life Ins. Co. v. Goble*, 51 Neb. 5. In that case it was held: "In the absence of an express agreement or other circumstances avoiding the operation of the rule, the remittance of a bank draft is not a payment in fact until the draft has been received, presented, and honored. A written acknowledgment or receipt of payment is not conclusive, when the medium of the remittance upon which it is based has failed." Defendant's counsel also cites 30 Cyc. 1223, and 9 Ency. of Evi. 728. These authorities are not directly in point, and it is difficult for us to see, in the light of the evidence, how the plaintiff could have been mistaken or have failed to observe the plainly written words "Bal. in full to date," which are found upon the face of the check which he accepted, held for some little time, and finally cashed at the bank. As we view the evidence, it was sufficient to require the jury to return a verdict for the defendant. It is not necessary to consider the rest of the errors assigned.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

SUNDERLAND & SAUNDERS, APPELLANTS, V. FRANK B. HIBBARD, APPELLEE.

FILED OCTOBER 16, 1914. No. 17,861.

1. **Gaming:** INTENT: ACTION FOR COMMISSION. In an action by an agent against a principal to recover for alleged commissions and money advanced for the principal in transactions involving alleged purchases of grain on the Chicago board of trade for future delivery, the question is whether the intention was that the principal should become the actual buyer of grain through the agency of the commission merchants, or whether they expressly or impliedly agreed to act as the principal's agents in gambling purchases of grain which the principal had no intention of receiving.
2. ———: TRANSACTIONS OF BOARD OF TRADE: EVIDENCE. Evidence examined, and *held*, that the only conclusion to be reached from the testimony is that the contract was based on a wagering transaction; that there was in fact no intention on the part of the parties to engage in a *bona fide* purchase, to be followed by an actual delivery of the commodity in which they nominally dealt; that such transaction was a gambling venture and speculation in the fluctuation in the price of wheat in the market, and was a violation of the provisions of section 8816, Rev. St. 1913, and contrary to public policy.
3. ———: ENFORCEMENT OF CONTRACT. In such a case the courts of this state will not aid either party to the transaction.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Duncan M. Vinsonhaler, for appellants.

George A. Magney, contra.

BARNES, J.

Action in the district court for Douglas county to recover the sum of $5,593.75, with interest thereon at the rate of 7 per cent. per annum from June 1, 1910, alleged to be due from defendant to plaintiffs for money paid and commissions earned for him by plaintiffs in dealing in wheat on the Chicago board of trade from the 16th day of June, 1908, to the 31st day of May, 1910. Plaintiffs'

amended petition set out the several transactions in full. To this petition the defendant filed an answer, denying every allegation contained therein, except such as were specifically admitted, and as one of his defenses to the action it was alleged that on the date set forth in the petition the plaintiffs were in the commission business in Omaha, Nebraska, and Chicago, and during all of said time dealt and traded in what are known as options on 'change in Chicago and Omaha in grain and provisions by selling and putting in the market on 'change certain grain for future delivery, when in fact no delivery was ever intended and demanded, and no grain was bought or sold or intended to be bought or sold; that on the dates stated in said petition the defendant took an option of said plaintiffs on grain as aforesaid for future delivery, when in fact no delivery was ever intended or demanded, and no grain was bought or sold or intended to be bought or sold, and that the same is true in every instance whether the defendant bought grain for future delivery or sold grain for future delivery, as stated in said petition. Defendant further alleged that all the transactions referred to in said petition were ventures and speculations on margins depending for profit or loss on the fluctuations of the market, and were purely fictitious and gambling transactions, and that in all of said transactions no consideration was received or paid, and that the amount claimed in said petition is for a pretended loss in said dealings in said options at the time stated in said petition, and is without consideration and wholly void, and in violation of the law and contrary to public policy, all of which the said plaintiffs well knew. As a further defense it was alleged that it was understood and agreed between plaintiffs and defendant, in reference to all of said transactions set forth in said petition, that whenever the margins paid to the plaintiffs by defendant in said transactions were exhausted by the raising or falling of the market the plaintiffs were to close out the deal before there should be any loss; that defendant never in any manner authorized plaintiffs to pay or be responsible for any sums of money whatever for the

defendant. Plaintiffs filed a reply which, in substance, was a special denial of the facts alleged in defendant's answer. The cause was tried to a jury, and resulted in a verdict and judgment for the defendant, and the plaintiffs have brought the case to this court by an appeal.

On the trial plaintiffs called one M. P. Miller as a witness, who testified, in substance, that he was employed by the plaintiffs; that plaintiffs were engaged in the grain, commission and provision business, and acted as commission merchants between parties who bought or sold through them; that he had been acquainted with the defendant for five years; that the defendant had been a customer for fully three years, and that he had frequently received orders from the defendant in plaintiffs' office, either in person or by telegraph; that upon receipt of the orders plaintiffs would telegraph the same at once over their wire to Bartlett, Patten & Company, their correspondents, who would thereupon wire back that they had executed the order, and he would enter it on plaintiffs' books and notify defendant, sending him a confirmation by mail addressed to defendant at Irvington, Nebraska. The witness identified exhibits 1, 2, and 11 as having been sent to Mr. Hibbard by plaintiffs over the Western Union Telegraph. Exhibit 11 reads as follows: "5/27/10. F. B. Hibbard, Irvington, Neb. Market very weak. Please come in if possible." The witness then testified that the next day after sending this telegram Mr. Hibbard called at the plaintiffs' office; that Hibbard stood by the desk of the witness watching the market reports; that the market was still going down; that witness said to defendant, "What do you wish to do?" and defendant replied, "I will go down and see Carl first (that meant his son at South Omaha)," that defendant went down, and the witness expected him to come back in the afternoon and fix the matter up; that the defendant at that time had purchased through plaintiffs 130,000 bushels of September wheat; that at the time the defendant was in the office he had told him that his margin was just about exhausted, and that plaintiffs needed more margins; that defendant did not return, and he heard noth-

ing from him; that on the 31st day of May plaintiffs wired their Chicago correspondents to sell the 130,000 bushels of September wheat, and that their correspondents wired back that they had done so; that thereupon he mailed to defendant exhibits 4, 5, 6, 7, 8, 9, 10 and 12; that the loss as a result of this sale was $17,087.56. Plaintiffs thereupon offered in evidence exhibits 3 to 12, inclusive, to which defendant objected as being irrelevant, immaterial and incompetent. The objection was overruled, and the exhibits were received in evidence. A copy of one of them will be sufficient for the consideration of this appeal. Leaving out the letter-head, exhibit 10 reads as follows:

"F. B. Hibbard, Omaha, Neb., May 31, 1910. Subject to the rules, regulations and customs of the board of trade of the city of Chicago, or the exchange in which this order is executed; and any rules, regulations and requirements of its board of directors, and all amendments that may be made thereto, we have this day sold for your account and risk through Bartlett, Patten & Company 10 Sep. wheat 90¼. Sunderland & Saunders."

The witness explained that the item of commissions appearing on exhibit 12 was a charge made by the plaintiffs of one-eighth of a cent a bushel for all grain bought and sold, and of this commission plaintiffs received one-half and their Chicago correspondents one-half; that the plaintiffs were required to keep and deposit with their Chicago correspondents a sufficient margin to protect all their trades made through that correspondent, and that the plaintiffs had paid to Bartlett, Patten & Company the loss resulting from this transaction with Hibbard, and of that loss the sum of $5,593.75 had never been repaid by defendant or any one in his behalf.

On cross-examination Miller further testified that he had been in the employ of plaintiffs since the 25th day of May, 1907; that he was at present the manager having general supervision of the business; that the orders for purchases and sales were handled by him; that he handled all of the orders of defendant during the year 1909, and from 1909 up to date; that the plaintiffs required a deposit

of one cent a bushel at the time of placing the order, and at the time of the conversation with defendant on May 28 defendant's margins were exhausted, but previous to that time he had had a margin; that he had told defendant that his margin was about exhausted, and in response to the question, "So that it was not entirely exhausted when you talked with him at that time? A. It may have been; it may have been a little more than exhausted. * * * Q. Well, now, then, what did you mean a while ago when you said it was about exhausted? A. Because, when we accept an account which is nearly exhausted we notify the party to that effect, and we would expect him to put up more margin to protect us in case the market goes further down." Without quoting further from the testimony of the witness, it is sufficient to say that he testified, in substance, as follows: When the plaintiff purchased wheat for the defendant it was always for future delivery; that all of defendant's transactions were in the future; that when they telegraphed an order to Bartlett, Patten & Company in Chicago they would go on the board of trade and buy or sell; and that Bartlett, Patten & Company would wire them of the execution and the same day mail them confirmation; that plaintiffs did not notify the defendant of the name of the party who bought or sold the wheat; that when they bought or sold wheat for defendant they did not inquire where the wheat was, and that defendant never asked, nor did they ever tell him, where it was; that they did not give him any receipt for it; that the only thing they gave him was a written confirmation; that they had never during all of the dealings with the defendant delivered a bushel of wheat to him; that, in regard to the 130,000 bushels of wheat sold to defendant Hibbard, they did not know that the wheat was in a warehouse in Chicago, and did not give Hibbard anything showing where it was, because they could not until it was delivered; that the transactions of the plaintiffs for the defendant were executed in the pit of the board of trade in Chicago; that all defendant ever paid on the transaction, or all that he was ever asked to pay, were

margins; that as a rule two cents a bushel is all the margin required for wheat, and that they always aimed to keep in defendant's account about one cent a bushel ahead of the market.

It must be observed that of the 130,000 bushels of wheat above referred to there never was a word said by either party about where the wheat was or where it was to come from. The plaintiffs did not know where the wheat was or whether it would be in existence or not when September came. They never gave the defendant a warehouse receipt, and all they ever required him to pay was margins, and all the transactions were executed in the pit of the board of trade in Chicago.

The defendant Hibbard testified, in substance, that in all of the transactions set out in the petition he had never received any of the grain purchased; that there never was anything said about receiving or delivering the grain at any time; that he never asked, nor was he ever told, where the corn was; that he never had any of the grain that he sold, and that they never gave him any warehouse receipt, or ever spoke to him about a warehouse receipt; that he was never told where the wheat or corn was stored or where it would come from; that he was never told where they got their market report, except from Chicago; that the statements that were furnished in each instance showed that whatever was done was done on the Chicago board of trade; that he had not raised any kind of grain for years; that he was never asked by plaintiffs to pay for any grain he bought, nor did he ever receive pay for the grain he sold, except where there were margins in his favor, and that the only money he was required to pay was to keep up the margins at two cents a bushel.

The foregoing statements from the testimony of Mr. Miller and the defendant Hibbard cover practically all of the evidence on this branch of the case, and there is no testimony given by any other witness that contradicts their statements. It therefore seems clear that neither party to these transactions ever intended the actual delivery of a single bushel of wheat or corn supposed to be involved

in the transactions set out in plaintiffs' petition. Usually when men actually buy and sell 130,000 bushels of wheat within a short time, it is expected to be delivered and paid for. They usually say something about where the grain is, and where and how it is to be delivered, and business men who buy and sell in good faith are not likely to close transactions of such magnitude and importance without a thorough understanding as to all of such details. Sutherland & Saunders never expected to be called upon to deliver this wheat, and certainly the defendant Hibbard never dreamed of such a thing. The question therefore is: Were the transactions within the inhibition of sections 8816-8819, Rev. St. 1913?

Section 8816 provides, among other things: "Every person who shall, as principal or as agent of any corporation or person or persons, set up and carry on a bucket-shop, or any person who shall accept employment from any person or persons or corporation engaged in the carrying on of a bucket-shop, and shall, under such employment in any manner or capacity, assist in carrying on a bucket-shop * * * shall be guilty of a felony. A 'bucket-shop' is defined to be an office, store, board-of-trade room, or other place wherein the proprietor or keeper thereof, or other person or agent, either in his or its own behalf, or as an agent or correspondent of any other person, corporation, association or copartnership within or without the state, conducts the business of making or offering to make contracts, agreements, trades or transactions respecting the purchase, or purchase and sale, of any stocks, grains, provisions, cotton or other commodity or personal property wherein said proprietor or keeper or patron contemplates or intends that the contracts, agreements, trades or transactions shall be, or may be, closed, adjusted or settled according to or upon the basis of the market quotations or prices made on any board of trade or exchange where there is competitive buying and selling, and upon which the commodities or securities referred to in such contracts, agreements, trades or transactions are dealt in, and without a *bona fide* transaction on such board

of trade, or wherein such keeper, proprietor or patron shall contemplate or intend that such contracts, agreements, trades or transactions shall be or may be deemed closed or terminated, when the market quotations of prices made on such board of trade or exchange for the articles or securities named in such contracts, agreements, trades or transactions shall reach a certain figure, and also any office, store or other place where the keeper, person or agent or proprietor thereof, either in his or its own behalf, or as an agent as aforesaid therein, makes or offers to make, with others, contracts, trades or transactions for the purchase or sale of any such commodity, wherein either party thereto do not contemplate or intend the actual or *bona fide* receipt or delivery of such property, but do contemplate or intend a settlement thereof based upon differences in the price at which said property is or is claimed to be bought and sold."

Considering the testimony in the light of the statute above quoted, it seems clear that the transactions in question in this case were inhibited by law. The same question was before this court in *Sprague v. Warren,* 26 Neb. 326, where it was held that no recovery could be had on like transactions. The same question was again before the court in *Rogers & Bro. v. Marriott,* 59 Neb. 759. The testimony in that case was very like the evidence in this case, and it was there held that the only conclusion which could be reached from the plaintiffs' evidence was that the contract was based on a wagering transaction, and that there was in fact no intention on the part of the parties to engage in a *bona fide* purchase, to be followed by an actual delivery of the commodity in which they nominally dealt, and that such transaction was a gambling venture and speculation in the fluctuation in the price of wheat in the markets, and was void as being contrary to public policy. In *Boon v. Gooch,* 95 Neb. 678, it was held: "The enactment of this statute did not affect the previous doctrine of this court, and that an action to recover the amount paid to a bucket-shop as margins cannot be maintained." It was said in the body of the opinion: "It will

be seen that this view has prevailed for more than 35 years, and that the courts of this state have consistently refused to lend their aid to either party in such transactions. The enactment of the statute of 1907 imposing a penalty upon the bucket-shop keeper in nowise operated to change the nature of the contract or the relations of the parties. * * * The transaction was illegal wherever conducted."

We think it is needless to review the cases from other states, and we are constrained to hold that the plaintiffs were not entitled to recover in this case. This view renders it unnecessary for us to discuss or determine the question of the giving of instruction No. 5.

The judgment of the district court is

AFFIRMED.

FRED BENSON, APPELLEE, V. CHARLES OLSON, APPELLANT.

GIDEON PETERSON, APPELLEE, V. CHARLES OLSON, APPELLANT.

FILED OCTOBER 16, 1914. No. 18,674.

1. **Intoxicating Liquors:** PETITION FOR LICENSE: SUFFICIENCY: BURDEN OF PROOF. In an application for a license to sell intoxicating liquors, to which a remonstrance was filed, wherein it was claimed that the petition was not signed by the requisite number of freeholders, the burden of proof is upon the applicant to establish, by competent evidence, the fact that a sufficient number of the petitioners were freeholders at the time they signed the petition.

2. ———: ———: QUALIFICATION OF PETITIONERS: EVIDENCE. The evidence of each of 35 of said petitioners that he was a freeholder in the village where the license is sought to be obtained, together with a proper deed conveying to each petitioner real estate in fee simple, bearing date prior to the filing of the petition, together with the oral evidence of each petitioner that he owns the real estate conveyed to him, and is in possession thereof at the time of the hearing, is sufficient *prima facie* evidence to qualify him to sign such a petition.

3. ———: APPLICATION FOR LICENSE: CHARACTER OF APPLICANT: EVIDENCE. Evidence taken at the hearing on the application for license

that the applicant was a man of respectable character and standing sufficiently establishes that fact.

4. ———: ———: PROOF OF PUBLICATION. The affidavit of the publisher of a newspaper accompanying and annexed to a notice of the filing of an application for a license for the sale of intoxicating liquors, after giving the name of the paper, which states that said newspaper has the largest circulation in the county in which the application is made, that the printed notice attached was to his personal knowledge published daily in such newspaper for two weeks prior to the time of the hearing on the application, is *prima facie* evidence of the publication of the notice, and that the same was inserted in the proper newspaper.

5. ———: ———: ———: IMPEACHMENT. Such affidavit may be impeached by competent evidence, but, where no evidence is offered for that purpose, it will be sufficient to authorize the board to act on the application.

6. ———: ———: DISQUALIFICATION OF BOARD. The remonstrator offered to prove by a member of the board, before whom the application was pending, that he had formed an opinion respecting the character and standing of the applicant prior to the filing of the petition, and that he had expressed his opinion in that respect, and has the same opinion still. Counsel for the applicant withdrew his previous objections to such offer, and the offer was not renewed. *Held,* not sufficient to establish the fact of the disqualification of the member of the board.

7. ———: ———: EXISTENCE OF CITY ORDINANCE: PRESUMPTION ON APPEAL. Where, on the hearing of an application for a license to sell intoxicating liquors in an incorporated village, the remonstrator makes no claim of the nonexistence of an ordinance authorizing the issuance of such a license, on appeal the existence of such an ordinance may be presumed.

8. ———: PETITION FOR LICENSE: IDENTITY OF PETITIONERS. Where one testifies at the hearing that he signed the petition for a license, and produces a deed showing his full name to have the same initials as those affixed to his surname as signed to the petition, such testimony is sufficient *prima facie* to identify him as being the same person who signed the petition.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

William V. Allen and *William L. Dowling,* for appellant.

H. C. Vail, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Madison county affirming the action of the board of trustees of the village of Newman Grove in granting licenses to Fred Benson and Gideon Peterson to sell malt, spirituous and vinous liquors in said village for the license year of 1914.

It appears that on the 24th day of May petitions were presented to the board of trustees, in the usual form in such cases, each signed by some 40 persons, who alleged therein that they were resident freeholders of said village; that the applicants were each of them men of respectable character and standing, and praying that a license be issued to each of them. To the petitions one Charles Olson filed remonstrances, denying that the petitioners were resident freeholders, and alleging, among other things, that no proper notice of the filing of the petitions had ever been given; that the notices and affidavits or proofs of service of the notices were not sufficient to confer jurisdiction on the board of trustees to act on said petitions. A collateral attack was also made on the previous election, which was held in said village, at which the question as to whether licenses for the sale of intoxicating liquors for the current year should be granted, and many other reasons were set forth as to why the licenses should be refused. The board fixed the 10th day of June, 1914, for the hearings on the applications, at which time there was a trial before the board, and licenses thereafter were granted to the applicants. The remonstrator appealed to the district court, where, as above stated, the action of the board of trustees was affirmed.

The denial of the qualifications of the signers to the petitions put that fact in issue, and the applicants were of course required to establish the qualifications of the signers. The record discloses that, in order to establish that fact, the applicants brought at least 35 of the petitioners before the board, and each of them testified that he resided in the village of Newman Grove, and was the owner of real estate in said village, that he signed the petitions;

and a part of them testified that they had known each of the applicants for several years, and that they were men of respectable character and standing. The following, in effect, is what each of the signers testified to on the hearing: "Q. Where do you live, Mr. Witt? A. Newman Grove. Q. What do you do? A. Sell prunes and calico—general store. Q. How long have you been in the business here? A. About 21 years. Q. Have you got a deed to your land? A. I have one here. I have three or four others. Q. What does it purport to be? A. That is a deed from Clara C. Krogh and husband to B. F. Witt and J. L. Witt. The corner building over here—store building. Q. What sized building is that? A. It is 90 feet long and the width of the lot; that is, about 24 or 25 feet. Q. Do you occupy that building now? A. Yes, sir. Q. Do you own it now? A. I do, my wife don't. I own everything in my name. My brother Jake has an interest in this lot. Q. You and your brother own it together? A. Yes, sir. Q. Jointly? A. Yes, sir. We have two or three other properties." Thereupon a deed conveying the property, which is situated in Newman Grove, to the witness in fee simple was introduced in evidence over the objections of the remonstrator, and the witness was asked: "Q. Do you own it (the property) now? A. I do."

Witt's deed, introduced in evidence, bore date of the 27th day of February, 1899. As above stated, the testimony of at least 35 of the petitioners was taken, and each of them testified that he was the owner of real estate in the village of Newman Grove at the time of the hearing. Each of them introduced in evidence his deed conveying certain real estate from the grantors named therein to himself. Each of the deeds bore date prior to the time when the applicants filed their petitions, and each testified that he owned the property conveyed thereby at the time of the hearing.

Counsel for the remonstrator contend that the evidence was insufficient to authorize the board of trustees to act on the petitions of the applicants; in other words, that the signers to the petitions must each show that he was a

freeholder in the village of Newman Grove, and establish his title to his freehold with as much particularity as would be required in an action of ejectment. In support of this contention counsel cite *Rosenberg v. Rohrer,* 83 Neb. 469. In that case it was held that neither the certificates of the register of deeds nor the testimony of the deputy assessor was competent evidence that the petitioners were freeholders. It was further held that the introduction of deeds of conveyance to the signers ranging in dates from 1879 to 1907, taken alone, did not establish the fact of their ownership at the time of signing the petition; no other competent proof of present ownership being offered. It was not decided, however, that the introduction of deeds of conveyance, together with proof that each of the signers was the present owner of the premises described in his deed, as was done in this case, was not sufficient to establish such ownership, at least by *prima facie* evidence.

In *Starkey v. Palm,* 80 Neb. 393, it was held, in substance, that the statutory qualification of a freeholder as a petitioner upon an application for a saloon license does not require evidence so conclusive as would be requisite to enable him to recover in ejectment against an adverse claimant, but it is sufficient if he has shown that fact by record or documentary evidence, or both, and in good faith claims and believes himself to have a freehold estate in lands within the prescribed district within which he resides. We think this is the correct rule.

The several deeds introduced in evidence show that the signers were freeholders prior to the 24th day of May, 1914, which was the date on which the petitions were signed and filed. The oral evidence of the signers show that each of them owned the real estate described in his deed at the time of the trial before the board, and was in possession thereof at that time. This necessarily shows *prima facie* that they were freeholders on May 24, 1914.

Again, the evidence of 35 of the signers shows that each of them signed the petitions, and there was considerable evidence showing, or tending to show, that the petitioners

were men of respectable character and standing. This fact was amply proved at the hearing before the board, and, as we view the case, was sufficient evidence of the qualifications of the signers to authorize the board to act on the petitions of the applicants.

It is next contended that the licenses should have been refused because the notice published in the Norfolk Daily News was insufficient to confer jurisdiction on the board to act. No objections were made to the form of the notice, but it is claimed that it was not published a sufficient length of time before the board took action on the applications. Section 3845, Rev. St. 1913, provides: "No action shall be taken upon such application until at least two weeks' notice of the filing of the same has been given by publication in a newspaper published in the county having the largest circulation therein." By the proofs of publication attached to each of the notices, it appears that it was first published on the 26th day of May, 1914, and the last publication was on June 8, 1914, thus making 14 consecutive publications. It thus appears that the notices were published for two weeks prior to June 10, which was the date on which the hearing on the applications was commenced.

In *Rosewater v. Pinzenscham,* 38 Neb. 835, it was said: "Notice of an application for a license to sell intoxicating liquors must be published at least two weeks in a newspaper published in the county having the largest circulation therein, before any action can be taken on the application. When the notice is inserted in a daily paper, it must be published daily for the statutory period."

In *State v. City of South Omaha,* 33 Neb. 876, it was decided that a notice of an application for a license to sell intoxicating liquors must be published for two weeks in each issue of the paper. Where the paper containing the notice is a daily, the notice must be published daily; but, in case the paper having the largest circulation in the county is published weekly, the notice must be published therein in every issue of such paper for two weeks.

The proof of publication in this case shows that the notices were published daily in the Norfolk Daily News for

14 days, and no action was taken on the applications until two days after the date of the last publication. We are therefore of opinion that the notice was sufficient, and the board had jurisdiction to act on the applications.

It is further claimed that there was no competent evidence before the board that the Norfolk Daily News was the paper having the largest circulation in Madison county. That fact, however, was clearly set forth in the affidavit attached to the notice, and, while it may be conceded that the contested facts in a remonstrance are not as a general rule to be proved by affidavits, yet the code provides that certain things may be proved by affidavit. Section 7936, Rev. St. 1913, provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law." The affidavit of the publisher is *prima facie* evidence of the publication of the notice, and that the same was inserted in the proper newspaper.

In *Rosewater v. Pinzenscham, supra*, it was said: "The affidavit of the publisher of a newspaper, accompanying and annexed to such a notice, stating, after giving the name of the paper, 'that said newspaper has the largest circulation in Douglas county, and that the printed notice hereto attached was, to his personal knowledge, published daily in the said daily newspaper from the 15th day of December, 1892, to the 28th day of December, 1892,' is *prima facie* evidence of the publication of the notice, and that the same was inserted in the proper newspaper. The affidavit may be impeached by competent evidence." But no evidence was offered in this case impeaching, or tending to impeach, the statement in the affidavits that the Norfolk Daily News was the paper having the largest circulation of any newspaper in Madison county. It follows that the proof of publication was sufficient, and this contention of the remonstrator was properly overruled.

It is further contended that the district court erred in sustaining the rulings of the village board refusing the remonstrant the right to show that the several members of the board were disqualified to act on the petitions. It appears that counsel for the remonstrator put the following questions to Mr. Gustafson, a member of the board: "Q. Mr. Gustafson, you know Mr. Fred Benson and Mr. Gideon Peterson, do you not? A. Yes, sir. Q. And had you formed some opinion as to their character and standing before the case was tried?" This question was objected to as immaterial, and the objection was sustained. Counsel for the witness then made the following offer: "I offer to show by the witness on the stand that he had formed an opinion respecting the character and standing of each of the applicants prior to the filing of the petitions in this case and prior to the filing of the remonstrances thereon, and that he entered this case with such an opinion and has prejudged the case, and that he has at different times expressed his opinion in that respect, and still has such an opinion, and to that end I propound the following question: Had you formed an opinion of the character and standing of the applicants Gideon Peterson and Fred Benson at and prior to the filing of the remonstrance against said petitions by Charles Olson, in this case?" Thereupon the counsel for the petitioners stated: "The petitioners withdraw any objection to any question that goes to the question whether he has expressed any opinion before the hearing in this case, but, as to whether he has formed an opinion, the petitioners object to it as irrelevant and immaterial, and as trying to impeach the judgment of the board before they have passed on the question. The petitioners make no objection to asking any member of this board any question about any opinion he has expressed previous to this hearing." No further offer was made of any evidence impeaching, or tending to impeach, the qualifications of the members of the board. This offer was clearly incompetent, and, if the evidence had been received, it would not have been sufficient to accomplish that purpose.

It is further contended that the licenses should have been refused because of the testimony of the applicants as to their preparations for opening saloons in case the licenses were granted. It is claimed that Peterson bought the stock of liquors of a former proprietor of a saloon in Newman Grove before he had obtained his license, but the testimony shows that neither Peterson nor Benson had completed such purchase, and we are of opinion that, if they had made such a purchase contingent upon their obtaining a license to sell intoxicating liquors, it would not have disqualified them from obtaining their licenses, and the board would not have been justified in refusing to grant them licenses on that account.

Again, it is claimed that the licenses should have been refused because the applicants had tentatively agreed to employ certain bartenders, who in 1913 had worked for persons who it was alleged had sold liquors in violation of the law. There is no statute in this state that prohibits a board from granting a license to an applicant because he may employ a bartender who had worked during the previous year for a man who had violated the liquor law. The general right of opposition to the granting of a license must be limited to the cases specified by law.

It is also contended that the board had no authority to grant licenses to the applicants, for the reason that it does not affirmatively appear that there was an ordinance authorizing them to grant the licenses. In the absence of any contrary showing, it will be presumed, on appeal, that the village of Newman Grove had enacted such an ordinance, and that it conferred upon the board the right to grant liquor licenses. 89 Am. Dec., note, p. 669.

Finally, the fact that the attorneys for the remonstrator have devoted some six pages of their brief to the contention that the persons who testified did not identify themselves as the ones who signed the petitions by their initials, and therefore the petitions were not sufficient, has not been overlooked. We are of opinion that, where a man who has signed a petition by his surname and the initials of his Christian name, testifies that he signed the same, and in-

troduces a deed in evidence by which real estate is conveyed to him, which shows that the initials of his full Christian name are the same as those signed to the petition, this *prima facie* sufficiently identifies him as having signed such petition.

In conclusion, it appears that there was no attempt to show that there were not 30 *bona fide* freeholders who signed the petitions, and the evidence is at least sufficient *prima facie* to establish the qualifications of the signers. It sufficiently appears that the notices of the filing of the applications were published in the Norfolk Daily News, a paper having the largest circulation of any newspaper in Madison county. The notices served their purpose, for the remonstrator appeared before the board and urged all of the objections he could find to the issuance of the licenses. The hearing before the board was fairly conducted, and, as we view the record, no error was committed by the district court in affirming the judgment of the board by which the licenses in question were issued. The judgment of the district court is therefore

AFFIRMED.

ROSE, J., not sitting.

ALBERT T. KENNEY ET AL., APPELLEES, V. JOSEPH F. KRAJICEK, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,555.

Rehearing of case reported in 95 Neb. 259. *Judgment of affirmance adhered to.*

LETTON, J.

This case was heard before a department of the court and opinion handed down (95 Neb. 259), but has been reargued before the full court. On rehearing the defendant vigorously complained that the opinion suppressed the de-

cisive facts of the case; that it ignored the undue influence of the agent, Sinkula; that it misrepresented the actions of the wife and sons of defendant; and that it erred in holding that the retention of the property by the appellant and his efforts to sell the same through Sinkula amounted to an election and confirmation of the transaction. There is some merit in the complaint, especially as to the implication with respect to the wife and sons. It seems clear that Mrs. Krajicek wanted the younger son, Louis, to go with his father the first day to see that he did not drink, and that the next morning she asked the older son to go with her to prevent a purchase of the land. As to the transaction in Kenney's office in Stanton the evidence is in direct conflict. The Krajiceks say that the wife and son objected to the whole transaction at that time. Mr. Kenney testifies that he met the party on the farm the day before the contract was made; that Krajicek and the others went over the land, and that he himself walked over the pasture with him, which was the poorest part of the farm; that they discussed the sandy condition of the land, and defendant stated that he would go home and come out and see it again and bring his wife; that on that day he seemed perfectly sober; that the next day, when the wife and son were in his office, they objected to buying the place at $16,800, that Krajicek offered $16,000, and that finally they agreed upon $16,500 for the farm and a team of mules, harness and wagon, and that the wife and son made no objection when this conclusion was reached. The evidence does not sustain the charge that Sinkula had plied Krajicek with liquor; furthermore, we find absolutely no proof of any misrepresentations as to the quality of the land, and no more than ordinary representations were made as to its value.

The testimony of the scrivener who executed the contract in Kenney's office is to the effect that he noticed nothing out of the ordinary in the demeanor or actions of Krajicek, and heard nothing of the wife objecting to the making of the contract; the only dispute he heard being between Kenney and Krajicek with respect to the rate

of interest, Kenney wanting 5½ per cent. and Krajicek insisting that 5 per cent. was enough. There is evidence that Sinkula told Krajicek that each of two other men would buy the land if Krajicek did not, and that he procured one of them to say this to Krajicek on the first day that he was at the farm. This, however, apparently had little effect upon Krajicek, because his testimony is as follows: "Q. Did you have any talk with Mr. Judiker there that day? A. We didn't talk very much with Judiker; if he did, I don't remember anything. Q. Nothing Mr. Judiker said had any influence on you buying that land, did it? A. I don't know. * * * Q. You don't remember a thing he said there that day? A. I don't remember any talk."

It was nearly two months and a half after the defendant signed the contract and took the personal property home before he indicated in any manner that he was dissatisfied with the trade. At that time he stated in a letter as the ground for rescission: "The other day in looking over my papers I found that I had bought 280 acres of land from you. Now I was drunk at that time and did not know and understand what I was really doing." The fact is that some days after the transaction he sent for the team and had it at the time he wrote this letter. The evidence shows that Sinkula told him that he thought he could dispose of the land for him at an advanced price, and that he got permission to do so. Sinkula failing to find a purchaser to whom the land could be sold at a profit, defendant undertook to rescind by this letter.

The evidence shows that land of the best quality in Stanton county is worth from $100 to $125 an acre. This land was sold at about $57 an acre. It is apparent, therefore, that the buyer could not expect, and did not anticipate, that he was getting land worth much more than half the value of good farming land in that locality. It is possible that the judgment of Mrs. Krajicek and the oldest son was better than that of the father, and that it was a foolish contract on his part, but even a court of equity cannot act as guardian for all men

who make improvident purchases. With respect to the conflict in the evidence in regard to what occurred at Stanton, the district court had the witnesses before it, observed the demeanor of Krajicek and his family as compared with that of the other witnesses, and found against him. Our view of the testimony coincides with that of the district court upon this point. The case is not entirely free from doubt, and, had the trial judge set the contract aside, we should probably have given consideration to the fact that he had the great advantage of seeing and hearing the witnesses, adopted his view as to their credibility, and affirmed the judgment. Taking all the facts into consideration, we must adhere to our former judgment.

AFFIRMED.

FAWCETT, J., not sitting.

L. C. SHARP, APPELLANT, V. NATIONAL FIDELITY & CASUALTY COMPANY ET AL., APPELLEES.

GEORGE J. S. COLLINS, APPELLEE, V. L. C. SHARP, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,814.

1. **Contracts:** BUILDING CONTRACTS: CONSTRUCTION. The building contract involved in this controversy considered, and *held* to be a contract by the defendant Collins to "order all the material, and superintend all the work for the building," and not to be an ordinary building contract.
2. ———: ———: ACTION FOR DAMAGES: SUFFICIENCY OF EVIDENCE. Evidence set forth in the opinion *held* to justify the finding of the district court that the principal delays in the construction of the building and sidewalk were due to acts of the owner, and that he is not entitled to recover damages from the contractor therefor.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Judgment modified.*

P. A. Wells, for appellant.

Stout, Rose & Wells, B. N. Robertson and *Alvin F. Johnson, contra.*

LETTON, J.

This action was brought against the defendant Collins for failure to fully perform a contract to erect a building, and against the National Fidelity & Casualty Company upon the bond given to secure the faithful performance of the contract. The petition charges that the cost of the building exceeded the amount stipulated, that the building was not completed at the time stipulated, and claims damages for loss of rents, loss of profits in the business which Sharp expected to carry on in the building, and for defective construction. Collins admitted the execution of the contract and bond, denied the other allegations of the petition, and counterclaimed that there was due him for extras on the contract $1,729, with interest. Collins afterward brought an action against Sharp to foreclose a mechanic's lien for labor performed and material furnished in the erection of the building. A number of subcontractors and materialmen were parties to this suit and filed cross-petitions praying for foreclosure of their liens. By consent the latter action was consolidated with the first for the purpose of trial. A jury was waived and the case tried to the court, which found in favor of Collins, dismissed Sharp's petition in the law action, and rendered a judgment in favor of Collins for $1,809. In the equity suit it ordered the foreclosure of Collins mechanic's lien for $1,739 of this amount, and established and foreclosed the liens of the other defendants. Sharp has appealed in both actions.

The facts seem to be that, some time previous to the meeting of Sharp and Collins, Sharp had procured from Fisher & Lawrie, architects, plans and specifications for a brick machine-shop building. Collins was not called upon until it was found that bids could not be procured for the construction of the building, as specified, for the amount of money which Sharp desired to expend. These plans and specifications were gone over by Collins and

changed in a number of material particulars, and certain blue-print plans differing in some respects from those submitted by Fisher & Lawrie were made by Collins and submitted to Sharp before the contract was finally entered into. In drawing up the contract between the parties the ordinary printed form of builder's contract was used, but a number of the printed paragraphs were erased as not applicable to the actual understanding. By article 1 it was provided: "The contractor shall and will provide all the materials and perform all the work" for the building "as shown on the drawings and described in the specifications prepared by Fisher & Lawrie and George J. S. Collins." It was provided in article 6: "The contractor shall complete the several portions, and the whole work comprehended in this agreement, by and at the time or times hereinbefore stated, to wit, as soon as practicable, say November 1st, 1909." Article 8: "The owner agrees to pay for all labor and materials essential to the conduct of this work." Article 9: "It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work shall be $800. * * * Should the total cost of the building, as specified in article 13, be less than $8,200, the contractor shall be entitled to 25 per cent. of such saving, but shall pay all cost in excess of that amount, subject to additions and deductions as hereinbefore provided." By article 13 the contractor agreed to furnish a bond "that the cost of all materials and labor for the building, exclusive of the sum mentioned above, shall not exceed $8,200." The Casualty Company bond recited: "Whereas said principal has entered into a written article of agreement dated the 31st day of July, 1909, with said owner to order all the materials and superintend all the work for (describing the building). But the owner shall pay for all labor and material; said building to be constructed in accordance with the plans and specifications signed by the parties hereto."

There is a direct conflict in the evidence with respect to the identity of the specifications which formed part of the contract. Sharp produced the specifications prepared

by Fisher & Lawrie. These bear the genuine signatures of Collins and Sharp, which Sharp testifies were signed at the time the contract was entered into. Collins testifies, on the other hand, that no specifications were signed at that time, but claimed that the changed specifications were delivered to Sharp, and have never since been seen by him; that the specifications produced were signed nearly five months after the contract was signed, Sharp having produced them and stated that this was the copy which had been altered; and that he (Collins) signed them without examination. Collins keeps a diary in which he notes many facts with respect to his business. By reference to the diary he testified that this occurred on January 24, 1910, and that he only discovered that he had signed the wrong specifications on January 28, 1910, after he was told that Sharp had taken the specifications away. Whether this is the fact or not, it seems apparent that the signed specifications were not adhered to in the construction of the building, because in a number of important points neither the Fisher & Lawrie plans nor these specifications were followed. Moreover, many of the provisions of these specifications are not at all applicable to a contract of the nature of that actually entered into between these parties. Even if these actually are the specifications that were identified before using and which were used, it is evident that neither party treated many of their provisions as effective, and that Sharp is not entitled to insist upon their strict interpretation now. This being so, a large part of the complaint with respect to a departure from the specifications must fail.

The evidence also conflicts as to the time that the contract was signed. This is only material with respect to the time of completion, and, incidentally, as throwing light upon the actual understanding of the parties. The duplicate contracts bear date of August 31, 1909. Upon the back of the copy which Collins retained that date is also shown. The bond recites that the contract was dated July 31. The bond itself is dated August 7, 1909. Collins testified by the aid of his diary that he presented the drawings,

as changed by him, to Sharp on August 10, that negotiations continued until the 20th, but the contract was not actually signed until August 31. The agent for the insurance company testifies that at the time the bond was applied for it was his recollection that Collins had a copy of the contract. Upon cross-examination, however, it developed that in the copy of the agreement which was then furnished to the insurance company, which was produced at the trial and from which the provisions in the bond were drawn, the date is July 31, and the printed clause, "the contractor shall and will *provide* all the materials and *perform* all the work," had been so changed that it read, "that the contractor shall and will *order* all the material and *superintend* all the work for the building." In a few minor particulars, also, this contract differed from the actual contract which was signed. We are satisfied that the contracts which were actually signed were not executed until the day they bear date, and that this copy and the recital in the bond more nearly express the actual contract between the parties, as afterwards construed by the action of the parties themselves, than does the written contract, and that by an oversight the printed forms were not changed accordingly when the contracts were afterwards signed.

We are also of opinion that the clause, "as soon as practicable, say November 1st," should be taken to mean as soon as practicable, all things considered, and as near November 1st as can reasonably be expected, and that the fact that the contract was not signed until August 31 is of much weight in determining whether the building was completed within a reasonable time and whether the freezing of the concrete was due entirely to the fault of Collins. We cannot detail the evidence with respect to the causes for delay. It appears that the delay in the erection of the superstructure was largely owing to the fact that Sharp desired to order the steel from a Chicago dealer in second-hand material, and that through a mistake in the shipment the steel for the second floor did not arrive until November 1. That he interfered in this respect is denied by

Sharp; but, in any event, considerable delay was occasioned by the mistake of the Chicago concern. The delay in the construction of the sidewalk also seems to have been caused by a change with respect to glass to be imbedded in the concrete to light the area below. As to this, we think it clear that Sharp directed Collins to order this particular kind of glass. When the glass came it did not fit the metal frames in which it was to be placed, and this occasioned another delay, so that freezing weather came on before the concrete could be placed, and artificial heat was used in the attempt to preserve the work. There is no doubt that the sidewalk concrete work is not equal to what it should be, or what it would have been if it had been laid in warmer weather. We think the fault was not with Collins in either of these matters.

By the terms of the contract any delay occasioned by the act of Sharp operated to extend the time for completion to the extent of the time lost by the delay. Much of plaintiff's claim for damages is for loss of rents, for loss of use of that portion of the building intended to be occupied by his own business, and for loss of profits occasioned by his inability to fill orders for machinery on account of being unable to occupy the building. The latter item charged we think is too remote and speculative. It was not specially called to the attention of Collins at the time the contract was entered into, and could not reasonably have been anticipated within the contemplation of the parties when the contract was made. Under the rule in *Hadley v. Baxendale,* 9 Welsb. H. & G. (Eng.) *341, it is not a proper element of damages. As to the other items, we are of opinion that the delay was largely, if not altogether, occasioned by Sharp himself, and that he is not entitled to recover any damages for loss of rent and loss of use.

Items which Collins claims as extras, 53 in number, are set forth in detail in the pleadings, and evidence offered in support by him. The district court made specific findings upon each of these items, allowing some in full, reducing the amount of others, and finding in favor of Sharp as to others. The evidence as to many of these items is in

direct conflict. A discussion of the evidence as to each is impracticable within the proper limits of this opinion. It is sufficient to say that, considering the evidence upon the whole list, and also with regard to the extra compensation claimed by Collins, we have come to the conclusion that the amount awarded Collins should be reduced to the extent of $249.22. While Sharp is not justified in many of his contentions, he had reasonable cause for complaint in a number of respects, and the compensation to be awarded Collins should therefore be reduced in some degree.

We cannot refrain from saying that in our opinion the parties were most unbusinesslike and indefinite in entering into the contract and in their dealings afterwards, and that if either of them has not obtained full justice in this matter it is largely owing to his own careless methods.

The judgment of the district court awarding Collins a mechanic's lien is therefore reduced $249.22, with interest from the time allowed by the district court, and also the general judgment. It is further ordered that the costs in this court be equally divided between the parties.

JUDGMENT MODIFIED.

ROSE, J., not sitting.

JOHN HUDSON V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1914. No. 18,632.

1. **Rape:** SUFFICIENCY OF EVIDENCE. Evidence *held* to support the verdict.
2. ———: EVIDENCE OF OTHER ACTS: ADMISSIBILITY. In a prosecution for rape with consent, proof of other acts of intercourse occurring shortly after the time of the act charged is admissible, and the weight of such evidence as matter in corroboration is for the jury to determine.
3. ———: ———: CORROBORATION. While the prosecuting witness alone cannot furnish corroboration by her statements or testimony as to such

other acts, still, if her testimony in connection with other facts and circumstances in evidence convinces the jury that such took place, the whole of the proof is proper to be considered, and it is not erroneous to admit the testimony of the prosecutrix as to such acts and to allow it to go to the jury under a proper instruction.

4. **Criminal Law:** REFUSAL OF CAUTIONARY INSTRUCTION. A cautionary instruction as to the testimony of a sheriff *held* properly refused. *Keezer v. State*, 90 Neb. 238.

ERROR to the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed as modified.*

George A. Adams, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

LETTON, J.

Plaintiff in error, a young man about 21 years old, was convicted of the offense of rape without violence upon one Anna Weise, a girl of 14 years of age. He was convicted and sentenced to a term of seven years in the penitentiary.

1. It is contended that the evidence is insufficient to sustain the verdict. The argument is that the story of the prosecuting witness is so uncertain that no reliance should be placed upon it, and that it was induced by pressure upon her mind and by statements made by the prosecuting officers. An examination of the testimony clearly shows that this assignment cannot be sustained. The girl told a plain and connected story as to how she became acquainted with the defendant and as to the occasion upon which the sexual intercourse took place. It is true that upon cross-examination, apparently under a misapprehension of their purport, she gave affirmative answers to a number of leading questions propounded by counsel for defendant as to what was said to her by certain prosecuting officers, and which replies were somewhat inconsistent with her original testimony; but these she corrected afterwards. Taking her testimony as a whole, corroborated as it is by the testimony of the defendant himself as to their first meeting, and to the fact that she

was in his room several times at about the time when the act is charged to have been committed, and considering the further corroboration furnished by his voluntary admissions, the evidence seems amply sufficient to sustain the verdict.

2. It is complained that instructions 7, 8 and 14 were erroneously given. It is unnecessary to set these forth in this opinion, since the language used in each of them has repeatedly been approved by this court.

3. Error in permitting the state to prove by the prosecuting witness that the accused had had sexual intercourse with her at other times than that at which the charge in the information is laid is also assigned. There can be no doubt that proof of facts and circumstances tending to show other acts of intercourse about the time charged in the information is properly admissible in cases of this nature. *Leedom v. State,* 81 Neb. 585; *Woodruff v. State,* 72 Neb. 815. This evidence, in order to be corroborative in character should proceed from other sources than from the prosecutrix alone. If a witness testifies that criminal intercourse was had upon one day, the fact that she testifies that a like act was had upon another occasion does not corroborate her testimony. *Boling v. State,* 91 Neb. 599. The evidence was admissible as a part of the proof of other acts, but its value as matter of corroboration was for the jury. The court instructed the jury that the prosecuting witness could not corroborate herself by statements of other acts, and thus the interests of the defendant were protected. If, taken with the other evidence as to such acts, the jury believed that such intercourse occurred, it was proper to be taken into consideration.

4. Complaint is also made that the court erred in refusing to give instruction No. 5 asked by defendant. This was a cautionary instruction with respect to the testimony of police officers, detectives, constables, and sheriffs. The court properly refused to instruct as requested. No policeman, detectives or constable had testified, and the refusal

to so instruct was entirely proper. *Keezer v. State,* 90 Neb. 238.

We have considered each of the errors assigned and feel convinced that the defendant was rightfully convicted. His own testimony convinces us of this when viewed in connection with the other facts in the case.

The severity of the sentence is complained of. The defendant is only 21 years of age, and while in the argument and in the brief of the state, statements are made as to defendant's character, which, if disclosed by the record, might perhaps justify the sentence, we are convinced that the term of seven years is too severe a punishment when all the facts in this case are considered and when the immaturity of mind and the mental traits of the defendant are borne in mind. We believe that the ends of justice will more properly be subserved by reducing the term of sentence of the defendant to three years. The judgment of the district court is so modified, and as modified is affirmed.

AFFIRMED AS MODIFIED.

ROSE, J., not sitting.

OMAHA WOOL & STORAGE COMPANY, APPELLEE, V. CHICAGO GREAT WESTERN RAILROAD COMPANY ET AL., APPELLANTS.

FILED OCTOBER 16, 1914. No. 17,628.

Corporations: CONTRACTS: EXECUTION: PRESUMPTION. A contract pertaining to the business of a corporation, when formally executed in its name by its president, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation, and the presumption is not necessarily rebutted by mere failure of the directors' record to show affirmatively that such authority had been given.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

W. D. McHugh, Greene, Breckenridge, Gurley & Woodrough, W. H. Herdman and *Joline, Larkin & Rathbone,* for appellants.

Brome & Brome, contra.

ROSE, J.

This is a suit for the specific performance of an option to purchase at the agreed price of $7,500 a warehouse site in Omaha on the right of way of the Mason City & Fort Dodge Railway Company, defendant, the agreement having been inserted in a lease providing for the payment of an annual rental of $441 for the same premises. Charles Henry King was lessee and assigned the lease to plaintiff. The railroad company named held title to the leased land. Its corporate stock, except five shares, was owned by the Chicago Great Western Railway Company which, under a lease, operated the lines of the Mason City & Fort Dodge Railroad Company. The property and rights of the former, through a receiver's sale, were acquired by the Chicago Great Western Railroad Company, defendant. The lease for the warehouse site on the railroad's right of way was executed by A. B. Stickney and Charles H. F. Smith, receivers of the Chicago Great Western Railroad Company, and by the Mason City & Fort Dodge Railroad Company, by A. B. Stickney, president. The Central Trust Company of New York, defendant, had a mortgage on the property of the Mason City & Fort Dodge Railroad Company, before the lease for the warehouse site had been executed. By the terms of the mortgage, however, mortgagee obligated itself to release from its lien warehouse sites sold by the mortgagor. Under its lease plaintiff constructed at great expense, and afterward operated, a warehouse on the demised premises, paid the stipulated rentals, attempted to exercise its option to purchase the leased land for warehouse purposes, tendered the purchase price and demanded a deed. Performance on part of defendants was refused. The substance of the defense interposed is that the lease containing the option is not the

contract of the Mason City & Fort Dodge Railroad Company, because it was never authorized by the board of directors of that corporation. From a decree in favor of plaintiff defendants have appealed.

In assailing the decree for specific performance defendants argue: "That, where a corporation, situated as was the Mason City & Fort Dodge Railroad Company in this case, seeks to sell a part of its lands, the transaction must be carried out through its duly authorized board of directors; that its legal separate entity continues unimpaired in spite of the fact that it has mortgaged its property for a large amount and leased it subject to the mortgage."

Plaintiff, in conducting its warehouse business, patronized the railroad as a carrier. The warehouse inured to the carrier's benefit. The selling of portions of the right of way for warehouse purposes was not only within the power of the carrier, but was part of its general business. This right was protected by a contract requiring the mortgagee to release from its lien warehouse sites subsequently sold. It is insisted, nevertheless, that the option was never authorized at a meeting of the board of directors of the Mason City & Fort Dodge Railroad Company, and that therefore the agreement was void. The formal record of the proceedings of the board of directors does not affirmatively show specific authority for the sale. A witness testified that the agreement was never authorized at a board meeting. A by-law of the corporation, however, provides: "The executive power of the company shall be vested in the president, who shall preside over meetings of the board of directors and shall have the power and control over the affairs of the company when the board is not in session, subject to the approval of the board."

The lease on its face appears to be formal and valid, having been signed by the holder of the title as follows: "Mason City & Fort Dodge Railroad Company, By A. B. Stickney, President. Attest: G. F. Philleo, Asst. Secretary." There is nothing to indicate that Stickney attempted to act in his private capacity or for his in-

dividual profit, or that he did not act for the sole benefit of the corporation of which he was president. While there is some diversity of opinion, the weight of modern authority, as well as the better reasoning, supports the general principle that a contract pertaining to the business of a corporation, when formally executed in its name by its president, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548; *Chicago Pneumatic Tool Co. v. Munsell*, 107 Ill. App. 344; *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352; *White v. Elgin Creamery Co.*, 108 Ia. 522; *Little Saw Mill Valley Turnpike or Plank Road Co. v. Federal Street & P. V. P. R. Co.*, 194 Pa. St. 144; *Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. n. s. 376; *Patterson v. Robinson*, 116 N. Y. 193; *Davies v. Harvey Steel Co.*, 6 App. Div. (N. Y.) 166; *Patteson v. Ongley Electric Co.*, 87 Hun (N. Y.) 462; *United States Nat. Bank v. Homestead Bank*, 18 N. Y. Supp. 758.

When the executive power of the president to control the affairs of the company is considered, as shown in the by-law quoted, together with the undisputed facts narrated, the presumption that he had authority to execute the lease containing the option is not rebutted by mere failure of the board's record to show affirmatively that such authority had been given. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548. Want of authority is not otherwise shown.

On the record made, therefore, the option is enforceable. This conclusion makes the discussion of other questions unnecessary. Since the contract to sell the warehouse site is binding on the parties to it, mortgagee cannot defeat specific performance, because it bound itself to release from its lien warehouse sites subsequently sold.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

FURNAS COUNTY, APPELLANT, V. CHARLES M. EVANS ET AL., APPELLEES.

FILED OCTOBER 16, 1914. NO. 17,775.

1. **Trial:** DIRECTING VERDICT. Where there is no evidence to sustain a judgment for plaintiff, the trial court should, in a case tried to a jury, direct a verdict in favor of defendant.
2. **County Treasurers:** LIABILITY FOR INTEREST. "A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest." *Hamilton County v. Cunningham*, 87 Neb. 650.

APPEAL from the district court for Furnas county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Stevens, for appellant.

W. S. Morlan, J. F. Fults and *Lambe & Butler, contra.*

ROSE, J.

This is a suit on the official bond of a former treasurer of Furnas county to recover $1,296.65, a sum alleged to be due the county under the depository law as interest at the rate of 3 per cent. per annum on the average daily balances of public funds in depository and other banks during the years 1902 and 1903. Comp. St. 1901, ch. 18, art. III, secs. 18-23. The case was here before. At the first trial below the lower court sustained a demurrer to the petition and dismissed the action. In this court the petition was sustained and the action was held to be one to recover interest received and retained by the county treasurer on county funds deposited by him in depository and other banks. *Furnas County v. Evans*, 90 Neb. 37. After the case reappeared in the district court, defendants filed answers amounting to a general denial. Upon a trial of the issues, the trial court directed a verdict for defendants. From a judgment of dismissal plaintiff has appealed.

A reversal is sought for assigned error in directing a verdict for defendants. There is no dispute in the evidence about any material fact. Proof that the treasurer turned over to the county all interest received by him on the public funds described in the petition is uncontradicted. It follows that the verdict for defendants was properly directed, treating the action as one alone to recover interest received and retained by the county treasurer on public funds deposited by him in depository or other banks.

Plaintiff argues, however, that the treasurer is liable for negligence in failing to collect and turn over to the county, according to the terms of the depository law, the full amount of interest due on public funds deposited by him in depository and other banks. Assuming, but not deciding, that the petition is sufficient in this respect, plaintiff failed to make a case, when the depository law, as construed by this court, is considered with the undisputed facts. The treasurer deposited county money in four banks. Two of them were properly designated, bonded depositories. The others did not qualify under the depository law. The latter paid no interest on deposits of public funds. The county treasurer kept in the two regular depositories public funds in excess of the amounts contemplated by statute and by the depository bonds. On this excess no interest was paid. It is the unpaid interest on such excess and on the funds deposited in banks not qualified as depositories that plaintiff is seeking to recover from the treasurer. There is no evidence that any act or neglect of the treasurer prevented the selection or qualification of adequate depositories for all of the public funds or hindered or delayed the collection of interest. The rules of law applicable to the undisputed facts seem to be settled. In *Hamilton County v. Cunningham*, 87 Neb. 650, it is said: "A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest."

In a suit by Hamilton county against the Aurora National Bank, which had not qualified as a depository, to recover interest on public funds deposited therein by J. B. Cunningham, county treasurer, this court said: "If this transaction of depositing the money in the bank by Cunningham was in violation of law, as claimed, both Cunningham and the bank were parties to such violation, and would be equally liable therefor; and if the transaction, being in perfect good faith, were such that by its ultimate result either of the parties thereto was released, we see no escape from holding that both were released." *Hamilton County v. Aurora Nat. Bank*, 88 Neb. 280.

These precedents require an affirmance in the present case.

AFFIRMED.

LUCY BELLE CILEK, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.*

FILED OCTOBER 16, 1914. No. 18,275.

1. **Insurance:** CONTRACT. The policy of insurance and the application therefor examined together, and *held* to constitute the contract between the company and the insured.

2. ———: FORFEITURE. The application signed by the insured was dated June 13, 1899. The application was approved and policy issued at the home office of defendant on June 23. The premium was to be paid annually. The premium due in June, 1906, was not paid. The application contained a clause that the company would incur no liability until the application had been received and approved by the company at its home office and the premium had actually been paid to and accepted by the company or its authorized agent during the lifetime and good health of the applicant. The policy contained a stipulation that "A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first." The insured died July 23, 1906. *Held*, That the contract of insurance did not go into effect prior to the issuance of the policy on June 23, 1899; that the payment of premium for each

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*Rehearing denied, decree entered. See opinion, p. 60, *post*.

succeeding year extended the life of the policy for an additional year from June 23, and that, with the month's grace added to that date in 1906, the policy in suit had not lapsed, but was in full force and effect at the time of insured's death.

Rehearing of case reported in 95 Neb. 274. *Former judgment of reversal vacated and judgment of district court affirmed.*

FAWCETT, J.

On June 13, 1899, Henry H. Rye signed a written application on one of defendant's forms for $5,000 insurance. On June 23 the application was approved and the policy in suit signed by the officers of the defendant at its home office in New York City. A few days later, probably June 26, the policy was delivered to Mr. Rye. The assured paid the annual premiums thereon to and including the one due in June, 1905. He died July 23, 1906, without having paid the premium for that year. The defendant denied liability, and action was brought upon the policy in the district court for Sheridan county. Plaintiff had judgment, and the case was appealed to this court, where the judgment of the district court was reversed and the cause remanded. *Rye v. New York Life Ins. Co.*, 88 Neb. 707. Another trial was had, and plaintiff, who had subsequently remarried, again recovered. A second appeal was prosecuted to this court, where the judgment of the district court was again reversed. *Cilek v. New York Life Ins. Co.*, 95 Neb. 274. A rehearing in the second appeal was granted, additional briefs were filed, a reargument had, and the case is before us for reconsideration.

Plaintiff now relies for an affirmance of her judgment on the point that, at the time of the assured's death, on July 23, 1906, by the terms of the application and the policy, construed together as the contract of the parties, the policy had not lapsed for nonpayment of the premium. This point was not argued at the bar nor considered in either of our former opinions. The reason for this failure evidently was that counsel relied upon the other points then argued. It will be seen, therefore, that neither of

our former opinions can be treated as the law of the case. Indeed, if this point had been properly presented at the first hearing, neither of those opinions would have been written. If this were a matter in which counsel alone were concerned, we would now decline to consider the point at all, but plaintiff should not be required to suffer because her counsel had such confidence in other points upon which they relied that they overlooked the one now urged.

The application which the assured signed June 13 contained a clause that the company would incur no liability under the application until it had been received and approved by the company at the home office and the premium had actually been paid to and accepted by the company or its authorized agent during the lifetime and good health of the applicant. The application was not received and approved by the company at its home office until June 23, and, in the absence of proof as to when the premium was paid, we must assume that it was not paid until the policy was delivered some days later. The contract of insurance was, therefore, never a contract binding upon both parties prior to, at the earliest, June 23. The policy contains this stipulation on the part of the company: "A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of 5 per cent. per annum." If the contract of insurance did not become binding until June 23, the death of the assured on July 23 was within the month of grace allowed, and the policy had not lapsed. This very question was before the supreme court of the United States in McMaster against this same defendant, and the company was held liable by a united court in a very clear opinion by Mr. Chief Justice Fuller, which is reported in *McMaster v. New York Life Ins. Co.*, 183 U. S. 25. We had occasion once before to cite this case with approval. *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 692. In the *McMaster* case the application was dated December 12, 1893, and the policies December 18. The policies were delivered December

26. In the course of the opinion (p. 41) it is said: "The truth is the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the twelfth to the eighteenth. And, as the policies could not be forfeited for nonpayment during that time, the month of grace could not be shortened by deducting the six days which belonged to McMaster of right. In our opinion the payment of the first year's premiums made the policies nonforfeitable for the period of thirteen months, and, inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defence to the action."

In *Stramback v. Fidelity Mutual Life Ins. Co.,* 94 Minn. 281, a similar question was before the court. In that case the assured made his application August 25, 1902. The policy was issued September 8, and delivered September 24, 1902. The second semiannual payment in March, 1903, was paid, but the next premium due in September, 1903, was not paid. The assured died September 11, 1903. The trial court held that the policy became forfeited September 8, 1903, for failure to pay the premium due on that date. The application, like the one in the case at bar, stated that "the policy to be issued should not become binding on the company until the first payment due should have been actually received by it, or its authorized agent, during the lifetime and good health of the insured." The policy provided for the payment of subsequent premiums "upon the eighth day of the months of September and March in every year until the premiums for fifteen full years shall have been duly paid to the said company." The court say: "The primary question to be determined is, from what date did the insurance commence to run? Was it from date of payment of the first premium and delivery of the policy to the insured, September 24, or was it from date of issuance of the policy, September 8, or from date of the application, August 25?" The opinion then cites and quotes at length from the *McMaster*

case, *supra*. The judgment of the district court was reversed and judgment ordered for the plaintiff.

Little could be added to what has been said by these two eminent courts in their opinions above cited. Their reasoning meets our entire approval. We therefore hold that the contract of insurance in the case at bar did not go into effect until June 23, 1899; that the payment of premium for each succeeding year down to and including the payment in June, 1905, extended the life of the policy for an additional year from June 23, and that with the one month's grace added to June 23, 1906, the policy had not lapsed, but was in full force and effect at the time of Mr. Rye's death.

Prior to the death of the assured he had obtained from the company a loan of all of the accumulations on his policy up to and including the payment of June, 1905. The trial court found generally in favor of the plaintiff, "and that the policy in suit was delivered to the insured, who received it in due course of mail on June 26, 1899, and that the policy loan was paid in full on the death of the insured from its accumulation, and on that day there was also an excess of said accumulations amounting to $194.63 which was applicable toward the payment of premiums; that there is now due and owing from the defendant to the plaintiff, who is beneficiary under said policy, upon the cause of action set out in the pleadings, the full sum of $7,362.50," for which amount the court allowed judgment. We are unable to approve that part of the court's findings that there was an excess of accumulations amounting to $194.63. That question was disposed of adversely to plaintiff in our former opinions, which are now the law of the case upon the points therein decided.

Our former judgment is vacated, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

The following opinion on motion for rehearing was filed December 18, 1914. *Rehearing denied, decree entered.*

FAWCETT, J.

This case is before us on a motion for rehearing, or, if a rehearing is denied, for a modification of our opinion and judgment, *ante,* p. 56. After due consideration of the case, we are satisfied with our former opinion upon the merits.

Our judgment should, however, be modified, as claimed by defendant. In arriving at the judgment reached in our former opinion, we overlooked the fact that the decedent was indebted to the defendant in the sum of $1,365 on a policy loan, in the application for which plaintiff as his beneficiary had joined. In January preceding his death the decedent had applied for a loan for the full amount of the reserve under his policy, which was the sum above named. The loan was made. The policy, by its express terms, provides: "Any indebtedness to the company, including any balance of the premium for the insurance year remaining unpaid, will be deducted in any settlement of this policy, or of any benefit thereunder." The trial court found "that the policy loan was paid in full on the death of the insured from its accumulation." This was a plain error and directly contrary to our holding when the case was first before us (*Rye v. New York Life Ins. Co.,* 88 Neb. 707), where we held: "The policy provides in express terms: 'If the insured is living on the 13th day of June, 1919, which is the end of the twenty-year accumulation period of this policy, and if the premiums shall have been duly paid to that date, and not otherwise, the company will apportion to the insured his share of the accumulated profits.' It appears that no surplus or profits could be ascertained or credited to this policy until the date of its maturity, which is the 13th day of June, 1919." The district court evidently confounded accumulation with reserve. The amount of the loan made to the decedent was the full amount of the reserve then held by the company under the policy in suit. It did not represent profits or accumulations. By the terms of the policy the assured had the right, at any time after two years, to obtain from the company a policy loan equal to the full

amount of the reserve, but there was no condition in the policy which conferred upon him, at any time prior to the expiration of the full 20-year period, a right to any accumulations or profits, either by loan or otherwise. On the contrary, the condition of the policy was, as above shown, that he should not participate in the profits of the company unless he was living at the expiration of the 20-year period. The company, under the terms of its similar contracts with its other policy-holders, could not, prior to that time, lend or pay to the insured or his beneficiary any profits. The profits were not determinable or ascertainable until the expiration of the full 20-year period. The trial court treated the reserve, which formed the basis of the loan, as an accumulation, and gave judgment for the full sum of $5,000, with interest at 7 per cent. per annum from the date of the assured's death until the date of the judgment. This was contrary to the express terms of the policy. The court should have deducted from the $5,000 the $1,365 loan, plus interest thereon for one month and ten days, viz., from the date on which the interest had been paid on the loan to the date of the assured's death, in the sum of $7.57, and rendered judgment for $3,627.43, plus interest, which would have made the gross amount for which judgment should have been entered $5,397.37. The judgment is so palpably and grossly excessive in amount that, regardless of the ordinary rules of procedure on appeal, we cannot permit it to stand.

Motion for rehearing overruled. Our former opinion on the question of defendant's liability adhered to. Our judgment of affirmance vacated, and judgment ordered in this court in favor of plaintiff for $5,397.37.

JUDGMENT ACCORDINGLY.

STATE, EX REL. OTTO W. MILLER, APPELLEE, V. THEO H. BERG, CITY CLERK, APPELLANT.

FILED OCTOBER 16, 1914. No. 18,538.

1. **Municipal Corporations:** RECALL OF OFFICERS: PETITION. When a petition is filed for the removal of a councilman or commissioner under section 5308, Rev. St. 1913, in a city where registration laws are in force, the city clerk, in determining whether or not the petition is signed by the requisite 30 per cent. of the qualified electors, is limited to the voters' register of such city.
2. ———: ———: ———: VERIFICATION. Where a petition filed for the removal of a commissioner under section 5308, Rev. St. 1913, is made up of a number of papers, and through oversight any of such papers have not been verified by the oath of one or more of the signers of the same, as required by section 5305, Rev. St. 1913, the city clerk should, on request, permit the attaching of such oath of verification, even after such petitions have been filed.
3. ———: ———: "HIGHEST VOTE CAST." The words "highest vote cast," as used in section 5308, Rev. St. 1913, mean the highest vote cast both for and against any candidate for office or proposition voted for at the last preceding general city election of such city.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, ALBERT J. CORNISH and P. JAMES COSGRAVE, JUDGES. *Reversed and dismissed.*

Fred C. Foster, D. H. McClenahan and *John S. Bishop,* for appellant.

Frank M. Tyrrell, contra.

John L. Webster, amicus curiæ.

FAWCETT, J.,

The city of Lincoln adopted the provisions of article V, ch. 52, Rev. St. 1913, and is now under the commission plan of government. Ornan J. King is one of its commissioners. The defendant, Theo H. Berg, is its city clerk. A petition and supplemental petition for the removal of Commissioner King, under the provisions of section 5308,

Rev. St. 1913, were filed. The city clerk certified that he had examined the petition and supplemental petition which had been filed in his office on December 5 and December 24, respectively, "and have compared the names on said petition with the voters' register of said city to ascertain whether or not the requisite number of qualified electors to call such an election have signed the same." He further certified: "I further find that said petitions contain 2,544 names; that 64 thereof are duplications; that 75 are illegible; that 1,146 are not registered; that 25 should not be counted because of proof that signatures are not genuine; that 267 were registered at addresses different than shown on petition; and that 967 were registered at addresses given; that the total number of qualified electors on said petition, as shown by the voters' register of said city, is 1,234. I further certify that 1,234 is not 30 per cent. of the highest vote cast at the last general city election held in Lincoln, Nebraska, on May 6, 1913." It was agreed that demand was made upon the city clerk that he use other satisfactory evidence than the registration books of the city of Lincoln, in order to determine whether the names found upon the recall petition were qualified electors of the city of Lincoln and authorized to sign such petition. It was also agreed that the highest vote cast on any proposition or office at the last general election was 7,962, and that the highest vote cast for any candidate, or for or against any proposition, was 5,236. The clerk took 7,962 as "the highest vote." Relator insists that he should have taken 5,236. If the clerk was right in excluding all signers whose names did not appear on the voters' register, the petition was insufficient under either theory. After the clerk had made his certificate, as above set out, relator instituted this action in the district court for Lancaster county, to secure a writ of mandamus ordering the clerk to recount the names on the recall petitions referred to and accept evidence of the qualifications of the signers thereof to vote whose names do not appear on the voters' register of the city, to permit relator to amend the recall petitions by attaching verifications thereto required

by section 5305, Rev. St. 1913, and to find that the meaning of "highest vote" under section 5308, *supra,* is the highest vote cast for any candidate or for or against any proposition submitted at the last general city election. The district court found on all three of these points in favor of the relator, and ordered: "It appearing that the clerk has by mistake of the law not counted and certified the petition in accordance with these findings of law, he is ordered, adjudged and decreed to proceed, count the names on the petition and determine their sufficiency, and report the same to the council, in accordance with the findings herein made." Respondent appeals.

The first point is decisive of the case. The journal entry in the court below states: "This cause came on for hearing and was submitted to the court on the pleadings and evidence. In answer to the question, 'shall the city clerk count the names of qualified electors found upon the recall petition, whose names are not found upon the voters' register of the city of Lincoln for the year 1912?' it is agreed that the city clerk rejected the names found on the petition and not found on the voters register. The court finds that the right of the voters to petition under the initiative, referendum, and recall law is the same as his right to vote at the election petitioned for. The clerk should in the first instance reject the names of petitioners, whose names do not appear upon the voters' register; if, however, and petitioner produces sufficient proof to the clerk that he is a qualified elector, entitled to vote, showing a satisfactory excuse, under the law, for not having registered, then in such case his name should be counted as a petitioner." We are unable to concur in this construction of the act. Section 5308 provides: "Any of such councilmen may be removed at any time from office by the qualified electors of any such city. The procedure to accomplish the removal of any incumbent of such office shall be as follows: A petition signed by such electors equal in number to at least thirty *per centum* of the highest vote cast at the last preceding general city election de-

manding an election of a successor to the person sought to be removed, and naming the candidate or candidates proposed for election to succeed him, shall be filed with the city clerk, which petition shall contain a general statement of the grounds upon which the removal is sought. Within ten days from the date of filing such petition, the city clerk shall examine it and from the voters' register, if the petition be filed in any city where registration laws are in force, or if not, then from such source as may be available to such clerk, ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow such clerk extra help for that purpose, and the clerk shall attach to said petition his certificate showing the result of such examination." It then provides that, if the clerk's certificate shows that it is insufficient in point of numbers signed, it may be amended within ten days from the date of the clerk's certificate, by the filing of a supplemental petition signed and sworn to as in the case of the original petition, "and the clerk shall, within ten days after such supplemental petition be filed, make a like examination of the supplemental petition, and if the certificate shall show the supplemental petition, together with the original petition, to contain the requisite number of signatures, the clerk shall submit such original petition and supplement together with his certificates, without delay, to the council," etc. This statute appears to us to be very plain, and, if the case were before us as a case of first impression, we would not hesitate to hold that, when a petition of recall is filed for the removal of a public official under the act in question, in a city where registration laws are in force, the clerk, in determining whether or not the petition is signed by the requisite 30 per cent. of the qualified electors, is limited to the voters' register of such city. But we are not left to the necessity of deciding the case as one of first impression. Other eminent courts have passed upon this question, under statutes almost identical with ours, and we now have the benefit of their holdings and of their reasoning in support thereof. *State v. Russell,* 124

Wis. 548; *Davenport v. City of Los Angeles,* 146 Cal. 508; *Chesney v. Jones,* 31 Okla. 363; *Floyd County v. State,* 112 Ga. 794, which also holds in accordance with *Gavin v. City of Atlanta,* 86 Ga. 132, that "the authorities generally concur that, where the law prescribes how the majority or two-thirds shall be ascertained, that method prevails." See, also, 2 Dillon, Municipal Corporations (5th ed.) sec. 468, where it is said: "When the terms under which the power of a motion is to be exercised are prescribed, they *must be pursued with strictness.*"

Other authorities are cited, strongly sustaining the rule announced in these cases, but we will not burden this opinion with a citation of them, for the reason that it appears to us that the construction given statutes like the one under consideration, by the courts above cited, is the only reasonable construction which can be given them. This construction of the act under consideration in no manner violates section 22, art. I of the constitution, that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." The section of the act under consideration does not assume to place any hindrance or impediment in the way of a qualified voter to exercise the elective franchise. It is not dealing with the question of election. It simply is determining who shall have the right, after an election has been held and an official, who was elected at such election has taken his office, to petition for the removal of such official before the expiration of his term of office. The right of any citizen, whether a voter or not, to petition for the removal from office of a public official is not a right guaranteed by the constitution. It is simply a privilege granted by the legislature, and it cannot be doubted that the legislature in granting any privilege may impose such conditions on the exercise of it as it sees fit. And so, in the act under consideration, the legislature has said that a qualified elector, whose name appears upon the voters' register, may, if he pleases, petition for the removal of a public official from office, and if he can secure the signatures of enough other qualified

electors, whose names appear on the voters' register, to join with him, he may then have the question submitted to the voters generally, at an election called for that purpose, at which election the act does not attempt to hinder or disfranchise any legal voter. At such election all may vote. *State v. Babcock,* 21 Neb. 187. The legislature, in the act granting the privilege of petitioning for the removal of a public official, has prescribed the procedure to be followed in exercising the privilege in language which is not ambiguous or uncertain. That procedure, as stated by Mr. Dillon in the quotation above given, *"must be pursued with strictness."* The conclusion we have reached on this point renders it unnecessary to consider any of the others; but, for the guidance of city clerks in the future, we will consider the second and third points.

The second point involves a consideration of section 5305, *supra,* which provides that the signatures to the petition for a recall need not all be appended to one paper, but requires that at least one of the signers of each paper shall make oath that the statements in the petition are true, as he verily believes, that the signers were at the time of signing legal voters of the city, and shall also state in the affidavit the number of signers in the petition or part thereof sworn to by him, at the time he makes such affidavit. The petition filed with the city clerk consisted of a number of separate papers, several of which were not verified by the oath or affidavit of any of the signers of the same. The district court found that these parts of the petition did not comply with the law, but further found "that, if relator asks leave to attach such verification to such paper within a reasonable time, he should be permitted to do so, if he can." Respondent argues that, as this finding of the court confirmed his contention that the petition as filed was not a compliance with the act, the court should have dismissed the action, and cites *State v. Weston,* 67 Neb. 175, and other Nebraska cases, in support of his contention. As a general proposition, respondent's contention is sound. It must be conceded that the holdings of this court have been that in mandamus the

right of a relator to relief must be clear and exist at the time the relief is sought, or his action cannot be maintained; but we hardly think the rule is applicable here. What the relator was complaining about was that the clerk was refusing to permit him to attach the verifications after the papers had been filed. We think if petitions are filed in a case of this character, which the voters have signed, they should not be deprived of their right to have their petitions considered because of the fact that the circulators of them neglected, through mere oversight, to attach the oath of verification. In such case we think the clerk should permit the formality to be observed even after the petitions have been filed.

The third point involves the construction of the language in section 5308, *supra,* that the petition shall be "signed by such electors equal in number to at least thirty *per centum* of the highest vote cast at the last preceding general city election." What is meant by the words "highest vote cast?" It is shown by the record that at the last city election, on May 6, 1913, the total number of persons voting was 8,549; that the total vote cast on the excise amendment was 7,962; that the highest vote cast for or against any proposition or person was 5,236, which were cast for commissioner Dayton. The clerk found that "the highest vote" was that cast both for and against the excise amendment, while relator contends he should have taken the highest vote cast for *or* against any proposition or office, which would be the vote cast for Mr. Dayton. The district court sustained relator's contention. This we think was error. The language used by the legislature appears to us to be clear and unambiguous: "A petition signed by such electors equal in number to at least thirty *per centum* of the highest vote cast at the last preceding general city election." If the legislature had meant to say the highest vote cast at such election for or against any candidate for office or proposition submitted, it would have been easy to have said so. On the other hand, if it had intended to say that the petition should be signed by electors equal in number to 30 per cent. of all votes cast

at the election, it would have been easy to have said so; but the legislature did not use either of these terms. It used the expression "the highest vote cast." What was the highest vote cast at this election? It was the vote cast on the excise amendment, which was 7,962. The city clerk was right in using that number as the basis for his computation.

It clearly appearing that the respondent was acting well within the provisions of the act under consideration, and that the petition did not contain 30 per cent. of the qualified electors of the city, as shown by the voters' register, he was without authority to do otherwise than certify that the petition was insufficient.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

REESE, C. J., concurring in part.

I concur in the judgment rendered in this case, but do not concur in the construction given to section 5308, Rev. St. 1913, as to the meaning of the words "the highest vote cast." The contents of the section need not be here copied, as it is sufficiently set out in the majority opinion. The procedure requires a petition signed by electors equal in number to at least 30 *per centum* of the highest vote cast at the preceding election, in order to confer authority upon the city officers to call the election. I cannot read that section in any other way than as requiring 30 *per centum* of all the votes cast at the election. That certainly would be "the highest vote" cast, and that is what the statute says in plain language. The clear purport of this provision is to prevent constant agitation at the expense of the city, when persons are dissatisfied with the official action of some officer. "At least thirty *per centum*" of the voting strength of the city must show their dissatisfaction before the expense and agitation of an election shall be submitted to by the city government.

BRIDGET MCLAUGHLIN, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,710.

1. **Death: PRESUMPTION.** "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston*, 79 Neb. 238.
2. ———: ———. In such case the presumption is that the absentee died during the first seven years of his unexplained absence. There is no presumption that his death occurred at any particular time during said period.
3. ———: ———. In such case an insurer cannot avoid its contract of insurance on the life of such absentee because of an alleged violation by the insured of a by-law adopted by the insurer during such unexplained absence, without evidence that the insured was living when the by-law was adopted.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Brome & Brome and *A. H. Burnett,* for appellant.

M. F. Harrington, contra.

SEDGWICK, J.

This is an action on a fraternal beneficiary certificate for $1,000 issued by defendant to James W. McLaughlin. Plaintiff is the mother of assured, and is named in the certificate or insurance contract as beneficiary. In the petition it is alleged that assured is dead, and that he and plaintiff performed all of the conditions of the contract on their part. These allegations and the liability of defendant are denied in its answer. From judgment in favor of plaintiff for the full amount of her claim, defendant has appealed.

1. There is no direct evidence that assured is dead. To establish that fact and the resulting liability of defendant, plaintiff relied on proof of assured's absence without tidings for more than seven years. The beneficiary certificate became effective as an insurance contract May 2, 1900. At that time assured was an unmarried man, about 24 years of age, and resided with his father and mother and other members of their family at O'Neill, Nebraska. Shortly afterwards he went to Park City, Utah, and worked in a mine. While there he wrote and posted family letters regularly and sent money to his mother. Early in 1904 he left Utah and went to Lima, Peru. His father and mother received from him a letter dated at that place March 30, 1904, in which he said he had changed his residence because he thought he could do better down there, and stating: "I am going up to a place called Cerro de Pasco, so I cannot give you any address with letter, but will write you when I get settled." A companion, who went with him to Lima, but who promptly returned to Park City, wrote to assured's father as follows: "We stayed in the city of Lima, Peru, a couple of weeks and I, not seeing any favorable chances for work and not liking the climate, started for home. Jim refused to come with me, saying that he would try the mines first. On the day that I left there I saw him at the train starting for the mines of the Cerro de Pasco Mining Company which are located about sixty miles from the city." Assured has never since been heard of.

The first question is whether the evidence entirely fails to establish the presumption of death of the insured. The findings of the trial court in actions at law, like the verdict of a jury, will not be disturbed, if the evidence is substantially conflicting. The rule now thoroughly established and always acted upon is that the verdict of the jury or findings of the court in jury cases will be sustained by this court upon appeal, unless upon the whole record found to be clearly wrong. Other forms of expression sometimes adopted in opinions are not intended by the court to vary

or modify the rule now so well established and uniformly acted upon.

The best authorities, with substantial unanimity, hold that whether seven years' continued absence from one's usual place of residence will raise the presumption of death must depend largely upon the circumstances and conditions of each particular case. Upon this point the supreme court of Kansas, which has perhaps required as strict proof to raise this presumption as has any court in this country, said: "It is conceived, however, that the character of the inquiry, the persons of whom it must be made, and the place or places where it must be made are all to be determined by the circumstances of the case." *Modern Woodmen of America v. Gerdom,* 72 Kan. 391. In that case and in *Renard v. Bennett,* 76 Kan. 848, the court appears to adopt the rule that, when a young unmarried man leaves the home of his parents and goes from place to place for some time, corresponding regularly with his parents, and suddenly ceases corresponding, and nothing is heard from him for more than seven years, inquiry must be made at all places and of all people where there was any probability that information might be obtained. But, in general, the courts of this country have held, as did the supreme court of Wisconsin, that it "does not require proof of diligent search and inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years." *Miller v. Sovereign Camp, W. O. W.,* 140 Wis. 505. The supreme court of Minnesota approved this instruction: "If you find from the evidence that on the 17th day of July, 1901, Behlmer (that is, Fred) left his home, wife, and children, and that he has never returned, and that no tidings from him have ever been received by his family, a presumption arises after seven years that he is dead." *Behlmer v. Grand Lodge, A. O. U. W.,* 109 Minn. 305; *Magness v. Modern Woodmen of America,* 146 Ia. 1; *Oziah v. Howard,* 149 Ia. 199.

This question has frequently been before this court, and, so far as its application to the case at bar is concerned,

seems to have been definitely settled by our former decisions. In *Cox v. Ellsworth,* 18 Neb. 664, it was held: "The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death." In *Holdrege v. Livingston,* 79 Neb. 238, it was held: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." This seems to be in line with the holdings of the Wisconsin, Minnesota, and Iowa decisions above cited. The evidence in this case was that the assured was a young unmarried man. He had no home or fixed place of residence other than with his family at O'Neill, Nebraska. Soon after he was insured he was employed in Utah, but his sister testified, as quoted in the defendant's brief: "He was home about twice or three times a week." Several years after he was insured he went to Lima, Peru, with a young companion, and, after they had remained there about two weeks, he concluded to go into the mining regions prospecting or to find some occupation. He had been in the habit of writing home to his family once each month during all of this time, and had regularly and monthly sent money to his parents, who were very aged and apparently needed his assistance. When he concluded to go into the mining regions, he wrote a letter to his parents, telling them of his intention, and saying that as soon as he had located he would write and give them his address. This was the last that was ever heard in regard to him. His parents caused letters to be written addressed to him at Lima and also letters addressed to him in care of the mining corporation which he intended to visit, and these letters were returned uncalled for. If he had established a residence in Utah or in some foreign country, it might have been necessary to make further inquiries in such places of residence. His statement in his letter that "you

will see by the postmark on this letter that I have changed my place of resedent" was plainly not intended as a declaration that he established a residence there, which the evidence shows beyond question was not the fact.

In *Thomas v. Thomas,* 16 Neb. 553, it was held that a wife could not rely upon the presumption of the death of her husband because of his absence from her for a period of seven years, when she, after he had left her, removed from state to state, establishing new places of residence, and had made no inquiry at her place of residence at the time her husband left her. And, when the same case was before this court upon a subsequent appeal (19 Neb. 81), the court held that the fact that the husband had been seen alive within the seven years overcame the presumption of his death. But upon the first appeal it was definitely decided that, if he had been absent for a period of seven years, and during that time had not been heard from "by those who, were he living, would naturally hear from him," this was sufficient to raise the presumption of death. Surely it cannot be said that, under the evidence in this case, the finding of the trial court is so unsupported that we must say, as matter of law, that it is clearly wrong.

2. The defendant contends that under its by-laws the insured has forfeited his certificate. His original contract of insurance contained the provision that the assured should comply with the laws, rules and regulations in force when he became a member, or which might thereafter be enacted. In July, 1907, when the insurance had been in force more than seven years, and about three years after the assured was last heard from in Peru, the defendant alleges that it adopted the following by-law: "Any member who shall abscond, remove or depart from his home or last place of residence, and remain away for a period of one year, and not report to the clerk of his camp, or, if a member at large, to the sovereign clerk, of his location, with post office address, shall thereby forfeit his membership, and his beneficiary certificate shall become null and void. The absence or disappearance of a member from his last known place of residence for any

length of time shall not be sufficient evidence of the death of such member, and no right shall accrue under his certificate or membership to a beneficiary or beneficiaries, nor shall any benefits be paid until satisfactory proof has been made of the death of the member while in good standing. No beneficiary or other person shall have the right to pay assessments and dues for a member who has been absent for one year and whose location is unknown, but in such case the clerk of the camp shall notify the person offering to make such payments that no further payments will be accepted until proof of the member's location and residence is made within the time hereinafter provided, and such clerk shall record such member as suspended and report such action to the sovereign clerk, together with the residence and post office address of the beneficiary or beneficiaries and the last known address of the member; also such further information respecting the absence of the member as he possesses. Upon satisfactory proof of the member's whereabouts, the sovereign commander may order him reinstated in his camp upon payment of all arrearages in assessments and dues. In case of the failure of the member, his beneficiary or other persons interested in his certificate, to make proof of the member's whereabouts within six months after such notification by the clerk, his suspension shall remain and become permament and binding, and he cannot be reinstated except as above provided, and neither the member, his beneficiary, nor any other person shall have any right to benefits under his beneficiary certificate."

About three months after the adoption of this by-law, the clerk of the local camp notified Thomas McLaughlin, the father of the assured, in writing, as follows: "I hereby notify you that I must refuse any more money in payment for your son J. W. McLaughlin as assessments on his certificate, No. 15326, W. O. W., on account of his disappearance over one year ago, and will send him in suspended in my Oct. '07 report, by instruction from Sov. Camp. Am sorry, but can't help it." During the seven years prior to that time the mother of the assured, who

had received regular remittances from her son, paid regularly the dues as they matured, and afterwards, until the full seven years had expired, she tendered, or caused to be tendered, to the clerk of the local camp all dues and assessments. These tenders were refused and were afterwards kept intact by the assured's mother and brought into court on the trial.

It sometimes happens that one whose life is insured abandons his home and parents for more than seven years, and afterwards returns, or is known to be living. Insurance companies, no doubt, may adopt reasonable regulations to guard against payment of unjust claims in such cases. Whatever may be thought of the reasonableness of the rule adopted by defendant, as a general proposition, it cannot have the effect claimed for it in this case. When the assured went to South America, there was no such provision in his contract. If he lost his life in the mining regions within two weeks after he arrived there, it would, of course, not be insisted that several years thereafter a by-law could be adopted which would cancel his certificate. It is alleged as a defense in this case that he has violated this by-law. Unless he was living when the by-law was adopted, he could not violate it. This the defendant has wholly failed to prove. There is no presumption that he was then living. In Lawson, Law of Presumptive Evidence (2d ed.) p. 255, the author states that the rule in this country is different from the rule in England, and that in this country he is presumed to be alive until the end of seven years. The text and the notes seem to be in conflict on this point, and the authorities cited appear to be very conflicting.

In *Coe v. National Council of K. & L. of S.*, 96 Neb. 130, there is a quotation from the opinion of Sanborn, J., in *Northwestern Mutual Life Ins. Co. v. Stevens*, 71 Fed. 258, in which it is said: "The established presumption of fact from the disappearance of an individual under ordinary circumstances, from whom his relatives and acquaintances have never afterwards heard, is that he continues to live for seven years after his disappearance." The question

whether the presumption related to the particular time of death was not involved either in the case in the federal court or in our decision in which the language was quoted. In both cases the question was whether, under the special circumstances involved, the presumption of death arose before the expiration of seven years. The language used by the eminent jurist was apparently inadvertent. He intended to express the same idea which he stated in the syllabus, where the points of law are supposed to be accurately stated. "Seven years is the period at which the presumption of continued life ceases." The quotation in our decision discusses somewhat at large the special circumstances under which the presumption will arise in less than seven years, and it is that part of the quotation which applied in our case and which is approved. The federal court also cited Minnesota and Iowa decisions, where it is held that there is no presumption of the particular time of death, and in the *Coe* case we also cited *Winter v. Supreme Lodge K. of P.*, 96 Mo. App. 1, in which the law is stated in the syllabus: "The presumption of death, arising from unexplained absence for seven years, does not necessarily imply that the person died at the end of that period." This case was again before the appellate court (101 Mo. App. 550), and from both opinions it appears that it was determined upon the special circumstances in the case, and the question now before us was not necessarily determined or considered.

In 4 Ency. of Evi. 47, 48, the rule is stated "that the date on which the death of such an absentee occurred is a matter of proof," and "the burden of proof is on the party asserting that death occurred on a particular time." This statement of the law is well supported by authorities there cited. It is peculiarly applicable to this case. There is a strong probability that, if he had lived to adopt a post office address in Peru, he would have informed his parents of that fact, as he promised in his last letter that he would do. Even if the law were otherwise, and if the presumption ordinarily were that the absentee lived to the end of the seven years, the circumstances of this case are

such that we could not say that the trial court erred in not finding from the evidence that the assured lived until this by-law was enacted, and that he so violated the same and forfeited his beneficiary certificate. It is alleged that he was subject to this by-law, and that he has violated it. This could not be true unless he was living when the by-law was enacted, and this defendant has not proved.

The findings and judgment of the trial court are not so unsupported by the evidence that we can say they are clearly wrong. The judgment is therefore

AFFIRMED.

ROSE, J., dissents.

W. T. GIBSON, APPELLANT, V. SHERMAN COUNTY ET AL., APPELLEES.

FILED OCTOBER 16, 1914. No. 17,729.

1. **Appeal:** SUFFICIENCY OF PLEADINGS. Upon appeal to this court in a law case, when there are no special findings, no motion for new trial, and no bill of exceptions, the only question presented is as to the sufficiency of the pleadings to support the judgment.
2. **Counties:** CLAIMS: DEFENSES. The statute provides that claims against a county must be filed with the county clerk, who is also the clerk of the board of supervisors. If the record shows that a claim was before the board and acted upon, it is no defense upon appeal to the district court that the record fails to show that the clerk indorsed his filing upon the claim.
3. ———: ———: PLEADINGS. Formal pleadings are not necessary in presenting a claim to the county board. The statement in the claim before the county board of the contract to furnish materials, and that they were furnished and accepted and not paid for, would be all the pleading that would be necessary.
4. **Constitutional Law:** REMEDIAL LEGISLATION: CLAIMS AGAINST COUNTIES. If one sells articles to the county, necessary for the public use, and the same are received and used by the county, such sale, although prohibited by chapter 55, laws 1905, there being no money in the county treasury with which to pay for such articles when such contract of purchase is made, is not *malum in se*.

A subsequent act of the legislature authorizing the county to pay for the same is not void as an exercise of judicial power; nor is such statute a violation of section 15, art. III of our constitution, nor the fourteenth amendment of the federal constitution.

5. ———: ———: RES JUDICATA. Such subsequent act of the legislature is not a review and reversal of a judicial decision previously rendered disallowing the claim because of the bar of the former statute, its purpose and scope being to remove the claimant's disability to prosecute his claim; and such former decision is not an adjudication of the claim prosecuted under the subsequent statute.

6. **Limitation of Actions**: CLAIMS AGAINST COUNTIES. Such claim is not barred by the statute of limitations until four years from the subsequent act authorizing the county to pay the same.

7. **Counties**: CLAIMS: APPEAL. If the county recognizes its moral liability for the property so taken and used, and the county board allows the claim, such action should not be set aside upon appeal of a taxpayer.

APPEAL from the district court for Sherman county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

E. C. Strode and *M. V. Beghtol,* for appellant.

R. J. Nightingale, H. S. Nightingale and *R. P. Starr, contra.*

SEDGWICK, J.

This is an appeal from a judgment of the district court for Sherman county. It appears from the partial record before us that in the year 1906 plaintiff furnished materials for the construction of a bridge for Sherman county at the agreed price of $512.24. Afterwards he presented his claim to the county board for allowance, and it was allowed in full. From the action of the board a taxpayer took an appeal to the district court, where the action of the county board was reversed and the claim disallowed. The plaintiff has appealed to this court.

There is no bill of exceptions in the case. Two days after the final adjournment of the court, but within three days of the entry of the judgment, a motion for new trial was filed, which was afterwards stricken from the files be-

cause filed after the adjournment of the term. The statute provides: "The application for a new trial must be made at the term the * * * decision is rendered." Rev. St. 1913, sec. 7884. The record recites that the case was taken under advisement upon the evidence and typewritten briefs, and it was decided afterwards on the 26th day of March, 1912. The plaintiff insists that there was no regular continuance of the case to that day, and that there was no regularly adjourned session of court then held, and that neither he nor his attorneys had any notice that the case would be then decided, and so the plaintiff was unlawfully deprived of his right to file his motion. If these facts were fully shown in the record, we might be called upon to determine whether such action by the court was reversible error, or plaintiff should proceed by proceedings in equity, or was without remedy, but no sufficient facts are shown to present the question. There were no special findings. Under these circumstances the question presented by this record is whether the plaintiff was entitled to recover upon the pleadings. The petition alleged: "That on or about the 13th day of October, 1906, this plaintiff furnished to the defendant, county of Sherman, the following articles at an agreed price, which articles, together with the agreed prices thereof, which prices are the reasonable worth and value of said articles, were:

"1 span 40 ft. long, under truss at $7.63 per ft...$305.20
"2 " 32 ft. long piling and stringers at $6.47 per ft. $207.04

$512.24

"That said articles, known as the Reinertson bridge, were furnished at the special instance and request of the defendant Sherman county, and were furnished and delivered in every manner according to the directions of said county of Sherman at the point and place directed and requested by said county. That said Reinertson bridge has been accepted and used daily by the said county of Sherman and the taxpayers thereof, and that the said county

of Sherman has never objected to the building, erection, or use of said bridge." The answer admits these allegations and sets up specially alleged defenses. In the briefs it is conceded that the petition states a cause of action. The question then is whether the answer states a defense.

The only defenses relied upon in the brief are want of jurisdiction, the statute of limitations, former adjudication, and the unconstitutionality of the special act of the legislature upon which plaintiff relied.

1. The reason the court had no jurisdiction is stated to be that the record does not show that the claim was filed with the county clerk, but the record shows that the claim was acted upon by the county board, which could not have been done unless it was filed before them, and that is a complete answer to that objection. It appears from the answer that in March, 1907, the plaintiff filed this claim with the county board for allowance, and the board allowed the same, and upon appeal to the district court by a taxpayer the action of the county board was reversed and the claim dismissed.

On April 3, 1909, the legislature passed an act authorizing the county board to pay the debt. Laws 1909, ch. 178. On the 16th of November, 1910, plaintiff again presented his claim, which was again allowed, an appeal taken therefrom by the taxpayer, and the order of the county board again reversed, from which judgment of reversal this appeal is prosecuted.

The plaintiff alleges this act of the legislature in the petition, but the claim as filed with the county board did not contain such allegation. The defendants' attorneys insist that the plaintiff cannot now rely upon this act because of his failure to allege the same before the county board. As we understand it, this objection is substantially that the plaintiff is now prosecuting a different cause of action from that presented to the county board. Formal pleadings are not necessary in presenting a claim to the county board. The statement in the claim before the county board of the contract to furnish these materials,

and that they were furnished and accepted and not paid for, would be all the pleading that would be necessary.

2. The defendants admit in their brief that, "if the special act had been pleaded in the proceedings before the county board, and had been shown to apply to this particular claim, then the bar of the statute would be removed." The cases cited seem to hold that such an act is valid, and it appears that this court and the supreme court of the United States have also held that in Nebraska such an act is valid. *Commissioners of Jefferson County v. People,* 5 Neb. 127; *Read v. Plattsmouth,* 107 U. S. 568.

3. Chapter 55, laws 1905, is entitled "An act to prevent the illegal expenditure of public funds," and section 3 of the act provides: "No judgment shall hereafter be rendered by any court against any such county in any action brought to recover for any article, public improvement, material, service or labor contracted for or ordered in contravention of any statutory limitation, or when there are or were no funds legally available at the time, with which to pay for the same, or in the absence of a statute expressly authorizing such contract." The district court upon appeal from the first allowance of the plaintiff's claim by the county board reversed the order of the county board allowing the claim, because there were no funds with which to pay the claim legally available at the time the plaintiff entered into the contract with the county, basing its decision upon the provision of the statute above quoted. The taxpayer who resists the claim now insists that the act of 1909 was invalid, because it attempted to reverse the judgment of the district court, and so was an attempted exercise of judicial powers; and, second, because it violated section 15, art. III of the coustitution; and, third, because it "contravenes the fourteenth amendment to the federal constitution, which provides that no state shall deprive any person of property without due process of law." In *Ewell v. Daggs,* 108 U. S. 143, the action was to foreclose a real estate mortgage and the defense was a plea of usury. The contract was usurious under the law of Texas at the time it was entered into. Afterwards, the

usury law was abolished. The court said: "A distinction is made between acts which are *mala in se,* which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are *mala prohibita,* which are void or voidable, according to the nature and effect of the act prohibited. *Fletcher v. Stone,* 3 Pick. (Mass.) 250. It was accordingly held in Massachusetts that a mortgage or assurance given on a usurious consideration was only voidable, notwithstanding the strong words of the statute. *Green v. Kemp,* 13 Mass. *515. And, in such cases, the advance of the money, although the contract is illegal for usury, is a meritorious consideration, sufficient to support a subsequent liability or promise, when the positive bar of the statute has been removed. 'A man by express promise may render himself liable to pay back money which he had received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt.' *Flight v. Reed,* 1 H. & C. (Eng.) 703. The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. * * * And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri,* and not realized by having passed into a completed transaction, may, by a subsequent

statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court."

In the case at bar the plaintiff furnished to the county full value for the amount of his claim. The county accepted, retained, and still has and is using the property so obtained. The statute at the time deprived the plaintiff of any remedy, and the district court so held. The subsequent act of the legislature was not a determination that the district court was in error in so holding, but its purpose and effect was to remove the bar to the remedy. The county has received full value, which, if the contract is invalid, still imposes a moral obligation to remunerate plaintiff, and there is no doubt, under the authorities, that it was competent for the legislature to remove the technical bar of the statute, and, in doing so, would not exercise any judicial function. It is equally clear that this statute does not deprive the county of property without due process of law. The county has not resisted the payment of this claim. By its constituted authorities it has always recognized its moral obligation to pay the value of the goods received from the plaintiff and used by it for the public benefit. The legislature has removed the only legal impediment to so doing, and it ought not to be prevented from doing what justice and equity require. The right of a taxpayer to appeal from the allowance of claims by the county board was not given by the legislature for such purpose.

As to the defense of former adjudication, it appears that the act of the legislature itself recites that the reason of the former adverse judgment of the district court was that there was no money in the treasury with which to pay the claim. No other ground for the decision appears in the record, and the claim being just, and it being con-

ceded that it is wholly unpaid, the act of the legislature would be as competent to remove this objection as any other. None of the matters relied upon amount to a defense, and it appears that the plaintiff was entitled to a judgment upon the pleadings.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., not sitting.

LETTON, J., dissenting.

While the result in this case is probably desirable from a moral and equitable standpoint, it seems to me that the decision is in direct conflict with law. Chapter 55, laws 1905 (Rev. St. 1913, secs. 1104-1106), is entitled "An act to prevent the illegal expenditure of public funds." Section 3 of the act, as far as material, provides: "No judgment shall hereafter be rendered by any court against any such county in any action brought to recover for any article, public improvement, material, service or labor contracted for or ordered in contravention of any statutory limitation, or when there are or were no funds legally available at the time, with which to pay for the same, or in the absence of a statute expressly authorizing said contract."

The material was furnished to Sherman county after this act took effect. It seems to me that the district court obeyed this statute, and that this court has no authority to ignore it and virtually direct a verdict for the plaintiff. The special act authorizing the county board to pay the claim could not repeal, amend, or affect the mandatory provisions of this act which apply to the duty of courts, since none of the constitutional provisions with reference to the repeal or amendment of laws were followed in its enactment.

The act of 1905 was evidently designed to put upon inquiry every person who thereafter dealt with a county board or board of supervisors as to the legality of the proposed contract. It was a direct notification that, un-

less the contract was authorized, was not in contravention of any statutory limitations, and there were funds legally available at the time, it should be "wholly void as an obligation against said county." The purpose of the statute is beneficial. In my opinion it should be obeyed by this court, as well as by all other courts in the state. For these reasons, I dissent from the opinion, and think the judgment of the district court should be affirmed.

REX SANITARY CLOSET COMPANY, APPELLANT, V. ALBERT DUSTER, APPELLEE.

FILED OCTOBER 30, 1914. No. 17,868.

1. **Sales: ACTION FOR PRICE: FALSE REPRESENTATIONS: BURDEN OF PROOF.** Where, in a suit to recover the purchase price of an appliance, the defense is a rescission of the contract, consented to by the plaintiff, and the reply is that such consent was obtained by false and fraudulent representations, the burden is upon the plaintiff to establish the fact that such representations were made, and that it relied upon them when it consented to the rescission.
2. ———: ———: **DIRECTING VERDICT: SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* to sustain the action of the district court in directing a verdict for defendant.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Reeder & Lightner, for appellant.

W. M. Cornelius, contra.

LETTON, J.

Action to recover the purchase price of one oak cabinet closet, with disinfectants and pipe, sold upon a written contract which provided for 30 days' trial, and a guarantee that the closet was odorless and sanitary. The answer admits the purchase and alleges that the closet, when installed, was not sanitary and odorless, as guaranteed, of

which defendant notified plaintiff within 30 days from the time it arrived; that plaintiff requested time in which to send an expert to inspect it, but failed to do so, and afterwards notified him that he need not accept the same, asked him to sell it, and agreed to pay him for his services if he made a sale. In reply plaintiff pleads that defendant falsely represented that he had set the closet up, had given it a fair and reasonable trial and that it failed to comply with the representations, that these statements were false and untrue, and that the directions as to resale were induced by these false representations. After the evidence was adduced, the court directed a verdict for defendant, and the cause was dismissed.

By these pleadings the sale to defendant upon trial was admitted; and it was admitted that the plaintiff consented to the rescission of the sale by the defendant. The only issue remaining is as to whether this consent was procured by the false representations of defendant that he had installed and used the closet and that it was not satisfactory, and that plaintiff relied thereon. The burden was upon plaintiff to prove the falsity of these representations. It made no attempt to do so, except by testimony that numerous sales had been made and no complaints received from purchasers, and by whatever inference might be drawn from the fact that in his first letter of complaint defendant stated he had tried the closet, and in later letters he stated he had not used it.

The defendant testified that he purchased the closet from an agent to whom he described the room in which he expected to use it, which was a lean-to next to his house; that the agent directed him how to arrange the pipe; that when the closet came he set it up in accordance with these instructions, and tried it, using the chemicals which were sent with it according to directions, but the closet was not odorless or sanitary. The evidence also shows that after the defendant had tried the closet he complained that it was not satisfactory; that plaintiff promised to send a man to install it properly, but did not do so; that afterwards defendant wrote, offering to return the closet, and

saying, "I have it all ready, nicely packed without a scratch, not being used at all on account of not finding a proper place for it downstairs," and that after the receipt of this letter plaintiff accepted the offer to return it, and asked him to sell it as their agent if he could. This action shows that a trial of the closet was not considered by the plaintiff as essential to or as a condition of its return.

An inspection of the descriptive pamphlet or folder which is said to contain the instructions shows that its directions are not clear and specific, and do not exclude the idea that the closet may be installed with the outlet of the vent pipe placed otherwise than in a chimney flue or stovepipe. And the letter of defendant stating that he did not use the closet may be explained by his testimony that, in order to keep it clean, the receptacle sent with it had not been used.

A number of assignments of error are made; but, since the trial judge gave a peremptory instruction for defendant, it must have been on the theory that there was not sufficient evidence in the record to support a verdict for plaintiff under the issues made. Unless this is the case, the evidence should have been submitted to the jury. In our opinion plaintiff has not established the fact that the representations made by defendant, which induced plaintiff to consent to the rescission of the sale, were false and fraudulent, or that plaintiff relied thereon, and therefore the defendant was entitled to a directed verdict.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JOHN HUGHES, EXECUTOR, ET AL., APPELLEES, V. SARPY COUNTY, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,886.

1. **Arbitration and Award.** Submissions of controversies to arbitration are to be liberally construed so as to give effect to the intention of the parties. It is the policy of the law to encourage the settlement of disputes without litigation, and awards are favored in law.
2. ———: IMPEACHMENT OF AWARD: BURDEN OF PROOF. An award, when regularly made and published, is *prima facie* binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it.
3. **Counties:** ARBITRATION. County boards are vested with authority to submit matters in dispute to arbitration either under the provisions of the statute or the principles of the common law.
4. **Arbitration:** AWARD: CONCLUSIVENESS. In a common law submission an award was agreed upon by the arbitrators. It was written out, signed, inclosed in a sealed envelope, and given to one of the arbitrators for delivery. He failed to deliver it, but produced it in court upon an order being made to that effect. *Held*, That the intention at the time the award was signed was that it should be final, that it was not thereafter revocable, by either party alone, and that the mere failure to deliver it did not operate to set it aside.
5. ———: NOTICE. Where the evidence discloses that no hearing was contemplated, but that it was the intention of the parties that the arbitrators should meet at the proposed location of a road, view the premises, and award damages, and the arbitrators met in this manner upon a day fixed by one party, the other consenting thereto, the award is not void for want of notice of the time and place of the meeting of the arbitrators.

APPEAL from the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

E. S. Nickerson and *A. E. Langdon*, for appellant.

John W. Parish and *Edward M. Martin*, *contra.*

LETTON, J.

Proceedings were taken by the county authorities of Sarpy county to locate and open a road along the west line of a certain tract of land belonging to one Barney Hughes. A claim for damages was filed by him in the sum of $2,500. Appraisers were duly appointed who awarded him damages in the sum of $211. This was reduced to $121.25 at the hearing before the board of county commissioners. Hughes died, and an appeal was taken to the district court by his successors in interest.

While the proceedings on appeal were pending in the district court one of the plaintiffs had a conversation with one of the county commissioners with respect to submitting the question as to the amount of damages to arbitration. Afterwards the board of county commissioners passed the following resolution: "Francis Fricke is appointed arbitrator for Sarpy county in the matter of the damages on the Barney Hughes place by reason of the location of the public road on the west side thereof." Afterwards John Hughes, as executor, and representing the other heirs, selected one Stickley as arbitrator for defendants. Fricke and Stickley met, made an examination of the land and of the Osage orange hedge and fences along the line, and wrote out and signed the following document:

"We, the arbitrators appointed to place a valuation on hedge and wire fence on Hughes' property, place value as follows: Hedge, $900. Building fence on same 40 a., $75. Removing old fence and building new fence on next 40 a. north, $95. Next 40 a. north same, $95 if desired.

"J. F. Stickley, Arbitrator for Hughes.

"Francis Fricke, Arbitrator for County."

This paper was then placed in an envelope addressed to the county commissioners of Sarpy county and given to Fricke to file with the commissioners. He did not do so, but kept it in his possession until ordered to produce it by the court at the trial. The petition pleads these facts, and also pleads that the value of the Osage orange hedge was $1,000, and that the land actually taken was worth $1,500.

The answer is a general denial. At the trial plaintiffs waived any rights to damages by virtue of the taking of the land, and admitted that the findings of the arbitrators for $1,070 is in full of all damages claimed by plaintiff against the county of Sarpy. At the close of the testimony the plaintiff moved for a directed verdict, which motion was sustained, and the jury were directed to return a verdict for $1,070, the amount of the award. The county of Sarpy has appealed.

The usual assignments of error are made, and, in addition, that the court erred in receiving the alleged award, and in striking out the evidence of certain of defendant's witnesses who testified with respect to the value of the land before and its value after the opening of the road. The principal question involved is as to the weight to be given to the alleged award. The district court evidently treated the amount fixed in the award as a final determination of the value of the hedge, and, construing this in connection with the waiver by the plaintiff of all damages for the taking of the land, held it to be a final adjudication of the matters in controversy and as fixing the total damage at $1.070, the amount of the award. Whether this was correct depends upon the weight to be given to the finding of Fricke and Stickley as an award. It is clear that what was done did not constitute a binding arbitration under the provisions of the statute. Rev. St. 1913, secs. 8218-8235. The submission was not in writing, it was not acknowledged, nor was it made by order of court in a pending suit. None of the essential elements to an arbitration under the code appear in the record. Was this award final and binding under the common law?

In *Greer v. Canfield,* 38 Neb. 169, the facts were that by an oral agreement a certain dispute was left to be settled by arbitrators. The testimony as to the form of the submission was indefinite, but one of the arbitrators said he understood that they were to decide all matters of difference between the parties. The arbitrators considered the statements of the parties with reference to each item, and as to some of them heard evidence and arrived at a conclu-

sion, though no oath was administered to any witness. The validity of the award was attacked, but this was held to be a good common-law arbitration. "This is a common-law award, and a submission made by either party, either by word or deed, is sufficient. If the submission is by word, there is no remedy to recover on the award except by action; but the award, if fairly made within the scope of the matters submitted, will be valid and binding. *Tynan v. Tate,* 3 Neb. 388." In the absence of fraud or mistake an award, whether at common law or under the statute, when regularly made and published, is *prima facie* binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it. The right to revoke a common-law submission must be exercised before the making and publication of the award. *Bentley v. Davis,* 21 Neb. 685; *Fox, Canfield & Co. v. Graves,* 46 Neb. 812; *Connecticut Fire Ins. Co. v. O'Fallon,* 49 Neb. 740. We conclude that there is no evidence to show any invalidity in the arbitration and award.

It is contended that a county through its board of commissioners cannot become a party to an arbitration. While the matters involved in this controversy were not submitted under the statute, we are of opinion that sections 8218, 8219, Rev. St. 1913, with reference to statutory submissions, settle the question of power in the board to enter into either form of arbitration. Section 8218 provides: "All controversies, which might be the subject of civil actions, may be submitted to the decision of one or more arbitrators as hereinafter provided." Section 8219: "The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf, for the same subject matter," may proceed as directed. We think it was not the intention to limit the power to arbitrate to any narrower limits than the power to bring an action, and that the county board is vested with this authority under these provisions and the general statutory provisions granting a county the power to sue and to be sued and making the county board the managing agents for county affairs.

It is contended that, since Fricke refused to produce the award voluntarily, it was not complete, and that it was a mere report back to the county commissioners for their consideration. We are convinced that the intention at the time the award was signed was that it should be final. It was not thereafter revocable by either party. *Connecticut Fire Ins. Co. v. O'Fallon,* 49 Neb. 740. The mere failure of Fricke to deliver it to the county commissioners before the trial could not operate to set it aside.

It is also complained that there was no notice of the time and place for hearing served on the county commissioners. As a matter of fact there was no hearing. The proof is that one of the commissioners called upon Fricke after the meeting, gave him instructions, and told him the arbitrators would meet on a certain day and go over this hedge and land and award damages. The arbitrators proceeded to the locality where the proposed road had been established, examined the hedge, and fixed their own estimate as to damages. This seems to have been the intention of the parties as to the manner of proceeding, and no notice seems to have been contemplated or to be necessary. It is an elementary rule that submissions of controversies are to be liberally construed so as to give effect to the intentions of the parties. It is the policy of the law to encourage the settlement of disputes without litigation, and where no fraud or undue means are shown awards made are favored in law.

It is also claimed that the valuation of the hedge and the judgment are excessive. Osage orange timber is very durable and is peculiarly valuable for use as fence posts. There is evidence that about 1,200 posts were cut from the hedge, most of which were sold by the road supervisor. While we are inclined to think that the damages awarded on account of the hedge were too high, all damages for taking of the land, being afterwards waived, had the same effect as a remittitur, for it is clear that plaintiffs were entitled to from $300 to $350 for the value of the land actually taken. Viewed in this light, we think the award

should be upheld. While the proceedings at the trial were somewhat irregular, we find no prejudicial error.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

LANCASTER COUNTY, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED OCTOBER 30, 1914. No. 18,634.

1. **Limitaton of Actions:** ACTION AGAINST STATE. The statute which permits an action to be brought against the state by permission of the legislature or either house thereof provides: "The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require." Rev. St. 1913, sec. 1180. Under this direction it is the duty of the court to brush aside technical defenses and to act in like manner as if the parties were seeking to amicably settle their controversy. Under these provisions and the circumstances of this case as set forth in the opinion the statute of limitations should not be held to be a defense to the action.
2. **County Treasurers:** LIABILITY FOR DEPOSITS. Where a county treasurer has deposited money received by him for taxes "belonging to the several current funds of the county treasury" in a depository bank which has given bond as specified in the depository statute (laws 1891, ch. 50), he is not liable for the safe-keeping of the funds.
3. **Taxation:** LOSS OF STATE TAXES: LIABILITY OF COUNTY. Where the county treasurer is relieved from liability upon his bond for the loss of funds deposited in such banks, the county itself (in the absence of extraordinary circumstances, such as fraud, bad faith, or gross negligence in the selection of a depository or the approval of its bond) is free from liability to the state for money collected as taxes in the capacity as trustee for the state and deposited by the county treasurer in such depository bank.

4. ———: ———: ———. A county is not an insurer of the safe-keeping of funds derived from the collection of state taxes in its capacity as trustee for the state.

5. ———: ———: ERRONEOUS PAYMENT TO STATE: RECOVERY BY COUNTY. Where a county treasurer, under the mistaken idea that a county was the insurer of money received by it from taxes for the benefit of the state, paid to the state treasurer from other money belonging to the county an amount equal to the proportion which the state owned of the money deposited in a depository bank, which was lost on account of the failure of the bank without the fault of the county, an action may be maintained, under the permission of the state senate, to recover back such money erroneously paid, and the fact that certain entries were made in the county books by the treasurer charging the money lost to certain county funds, under the same mistaken idea, is no defense to the action.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Grant G. Martin, Attorney General, and *George W. Ayres,* for appellant.

Jesse B. Strode, Strode & Beghtol and *George E. Hager, contra.*

LETTON, J.

The following states plaintiff's cause of action in substance: In January, 1893, the Capitol National Bank of Lincoln was an authorized county depository. The treasurer of Lancaster county had on deposit therein $39,660.62, public money derived from the payment of taxes. Upon the 21st of that month the bank failed, and over $32,000 of the amount deposited was lost. The county treasurer, acting upon his own judgment, shortly afterwards paid to the state treasurer out of county funds the amount of $10,348.27 for taxes collected by Lancaster county for the state and lost by the failure of the bank. This action was taken under the belief that Lancaster county was an insurer of money collected for the state until it was delivered to the state treasurer. In 1903 an action was brought by Lancaster county against the state under permission of the legislature to recover this amount. A demurrer to the

petition was sustained and the action dismissed. On appeal the judgment of the district court was reversed and the cause remanded to the district court. Afterwards, through mistake and inadvertence and without the knowledge of Lancaster county officials, the case was dismissed. After this was done the senate passed a resolution, which recited the fact of the dismissal of the case through inadvertence, authorized the county to prosecute another action for the same purpose, directed the attorney general to defend the suit on behalf of the state, and also provided: "Be it further resolved that no alleged inattention or failure to prosecute the said claim or suit heretofore instituted shall be urged to the prejudice of any claim, action, or suit that may be filed and instituted by the said county of Lancaster." The prayer is for a judgment for the money paid to the state by mistake. The answer denies that any part of the money deposited in the Capitol National Bank was state money; that any part of the money paid to the state treasurer was paid through inadvertence or mistake; and that it was through inadvertence or mistake that the former action was dismissed. It is further pleaded that at the time the money was paid there was due the state for state taxes collected over $46,000, and that this sum was paid by the county treasurer on the day alleged, without any knowledge or notice on the part of the state that the payment or any part thereof was made or claimed to be made from county funds. It is also pleaded that after the failure of the bank the county treasurer charged certain specific funds of the county with an amount equal to the amount lost, and that his action in charging said funds with the loss was known to the county board, and approved and ratified by acquiescence for more than nine years, and that all dividends paid by the receiver were applied as county money. At the close of the trial the court instructed the jury to return a verdict in favor of the plaintiff for the full amount of the claim. Judgment was rendered, and the state appealed.

The state contends that the petition shows on its face that the statute of limitations had run when the action

was begun; that the resolution of the senate pleaded in the petition does not in express terms waive the running of the statute of limitations; and that, even if it had done so, the senate was without power to waive this defense, since it is only one branch of the legislature; that under section 1177, Rev. St. 1913, either branch of the legislature may waive the defense of sovereignty, but that neither house acting alone can waive other defenses. We cannot take this view. Section 1180, Rev. St. 1913, provides: "The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require." Under this express direction it is the duty of the court to brush aside technical defenses and to act in like manner as if the parties were seeking to amicably settle their controversy, and "as upon the testimony right and justice may require." Under the circumstances of this case, it seems to us that the lapse of time ought not to defeat a just claim.

It is next contended that the verdict is not sustained by sufficient evidence. The testimony shows that the total amount of money on hand with the county treasurer on January 1, 1913, was $192,275.16; that of this amount $60,964.60 had been collected for the state, which was 31.7 per cent. of the whole amount of money on hand. It is shown that all money in the treasurer's hands was deposited in the different depository banks in the city in the name of S. W. Burnham, Treasurer; that when deposited it was not divided into funds, and that the interest upon deposits was credited to the county. There is also testimony that it is impossible in the collection of taxes from day to day to separate the amount paid by each taxpayer into separate funds or to trace to each taxpayer the origin of the money deposited; but, in order to show that this fund contained both state and county taxes, the county showed the payment of all his taxes by an individual by check in 1892, the deposit of this check in the Capitol National

Bank, and that the money represented by this particular check was on hand in the bank at the time of the failure, and further proved that the custom was to deposit state, county, city, village, and other municipal district money received by the payment of taxes in gross, and to keep the funds separate by proper entries upon the books of the county treasurer. The state contends that since on the day of the bank failure there was due and on hand more than $150,000 over and above the amount on deposit in the Capitol National Bank, and since there was no provision in the statute for depositing state funds in a county depository, there is nothing to show that any part of the money deposited at that time was state money. The county takes the position that, since it is shown that the proportion of state funds on hand to the whole amount is 31.7 per cent., applying this proportion to the funds deposited in the Capitol National Bank, the state money in the bank at the time of the failure was $10,348.27. Section 6 of the depository statute (laws 1891, ch. 50) then in effect required the county treasurer to deposit in depository banks the money received by him "belonging to the several current funds of the county treasury." By section 11 the county treasurer is not liable for deposits made if the bank had given a bond as specified in the act. There can be no doubt that state, county, and other taxes collected by the county treasurer were "current funds belonging to the county treasurer," and were the funds which the law required him to deposit. We think there can be no question but that, where the county treasurer is relieved from liability upon his bond for the loss of funds deposited in such banks, the county itself (in the absence of extraordinary circumstances such as fraud, bad faith, or gross negligence in the selection of a depository and the approval of its bond) is free from liability to the state and to the various municipalities or districts for which it has collected taxes in the capacity of trustee. There is nothing in the statute which makes the county an insurer of such funds. Our attention has not been called to any decisions which hold to that effect.

We think it is immaterial whether all or only a part of the current funds of the county treasurer was deposited in the Capitol National Bank. We are of the opinion that, the treasurer having deposited one portion of the county funds in this particular bank and being relieved from liability to the county for the amount so deposited, the county having become unable by law to collect the money from the county treasurer, the state in the capacity of *cestui qui trust* could not require the county to pay that which it was unable to collect. Lancaster county was only bound to use the means provided by law for the safe-keeping of state funds in process of collection. At this time it had fulfilled its duty to the state as trustee by making the semiannual settlement with the state treasurer as required by the statute. The state insists that the books of the county treasurer's office show that the funds lost in the bank were charged to certain specified accounts, such as the general fund, bridge fund, insane fund, etc., and that by acquiescing in this charge the county is barred from commencing this suit. The testimony shows that these entries were made by the deputy county treasurer under the mistaken idea that the county was an insurer of state money. Under the generous provisions of the statute we think this does not constitute a defense. The county authorities followed the directions of the depository law with regard to the disposition of current funds collected by taxation. Through no fault of Lancaster county a portion of these funds was lost. By mistake, and without the knowledge of the county board, the county treasurer paid a portion of other county money to the state treasurer. In justice, equity, and good conscience, which is all that the statute authorizing this suit requires, that amount should be returned by the state to the county, and thus indirectly to the taxpayers of Lancaster county, who in the last analysis are the persons who suffer by the action of the state in retaining money to which it is not entitled.

The judgment of the district court is right, and is

AFFIRMED

ROSE, J., not sitting.

JOHN SHLIK, APPELLEE, V. ARMOUR & COMPANY ET AL., APPELLANTS.

FILED OCTOBER 30, 1914. No. 17,711.

Trial: REFUSAL OF PEREMPTORY INSTRUCTION. Where the evidence is insufficient to support a judgment in favor of plaintiff, it is error to refuse a peremptory instruction for defendant.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Mahoney & Kennedy, for appellants.

Dysart & Dysart, contra.

ROSE, J.

While plaintiff was engaged in icing refrigerator cars for Armour & Company he fell from a plank used as a bridge over a sidetrack between an elevated platform of the icehouse and the top of a refrigerator car on a parallel track. This is a suit to recover resulting damages in the sum of $20,000. The negligence imputed to the master is the furnishing of a plank from which a tapering splinter two inches wide at one end had been split off at one corner, leaving the plank seven inches wide at the narrow end; it being alleged that plaintiff used it under a promise to replace it with a good one. The master and its foreman are defendants. In addition to a general denial, except the employment and injury of plaintiff, defendants pleaded that he was guilty of contributory negligence, and that his injury resulted from obvious risks assumed by him. From judgment on a verdict in favor of plaintiff for $1,000 defendants appeal.

The controlling question on appeal is the sufficiency of the evidence to sustain the verdict. It is argued that all of the proofs are insufficient to sustain a finding that the use of a defective plank under a promise to furnish a new one was the proximate cause of the injury. Lines of refrigerator cars, with their tops about as high as the ice-

house platform, stood on parallel side-tracks. The materials for icing were carried in heavy iron buckets suspended from grooved wheels running on overhead metal rails which approached the side-tracks at right angles and ran up and down the lines of refrigerator cars. The buckets were pushed by hand from the platform, and were turned toward the cars to be iced by means of switches under the control of the icers, who walked from the platform onto the top of cars, and from one side-track to another, and from one car to another. When there was no car adjacent to the platform, a plank was used as a bridge therefrom to the top of a car on the second track. At the time of the accident plaintiff was using a plank for that purpose, when the bucket fell and struck the plank, plaintiff falling to the track below. He testified that the plank was defective in the manner already described, and that he used it under a promise by defendants to furnish a good one. He argues that it was weakened by the defect, and that it was thus narrowed at one end to such an extent that it oscillated, throwing him off when the bucket fell upon it, thus causing the injury of which he complains. His own testimony, however, shows that he had seen the switch, which was under his control. The only proper inference from all of the evidence in the record as now presented is that he pushed the overhead wheel through an open switch under his own control, the bucket consequently falling. There is no pleading or proof that defendants were guilty of any negligent act in connection with the falling of the bucket. There is no evidence to support a finding that plaintiff would have been injured, had the bucket not fallen on the plank, or that negligence on part of the defendants in furnishing a defective plank or in failing to furnish a good one, under all the circumstances proved, was the proximate cause of the injury. There is nothing but conjecture to indicate that the negligence pleaded was the proximate cause of plaintiff's injury. Into that field the jury should not have been permitted to go. In this view of the record, the verdict is not sustained by the evidence. Instructions based on evidence

of the negligence pleaded are, therefore, necessarily erronous. There should have been a peremptory instruction for defendants.

For the reasons stated, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JAMES MCWHORTER, APPELLANT, V. CHARLES SCHRAMM, APPELLEE.

FILED OCTOBER 30, 1914. No. 17,834.

1. **Elections: CONTEST: COMPLAINT.** When the complaint in a contested election case alleges the reception of illegal or the rejection of legal votes, the contestant, on motion, will be required to set out the names of the persons who so voted or whose votes were rejected, if known.
2. ———: ———: **BURDEN OF PROOF.** A contestant in a contested election case is required to prove the material allegations in his complaint, whether the incumbent has formally answered or not, and upon failure to furnish any proof of such allegations his action should be dismissed.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

M. H. Leamy, for appellant.

O. S. Spillman, contra.

FAWCETT, J.

Contestant brought suit in the district court for Pierce county to contest the election of incumbent as school district treasurer of district No. 30, in that county. From a judgment dismissing his action, he appeals.

Only one point need be considered. The substance of the complaint is that the incumbent was elected at the annual

school district meeting by a *viva voce* vote; that the officers in charge of the school election failed to make or keep any record of the proceedings, and failed to give notice of the time and place of holding the election; that "there was malconduct, fraud, and corruption" at the meeting on the part of the director and moderator; that incumbent was not eligible to the office; that eleven illegal votes were cast; that five legal votes, which would have been cast for contestant, were rejected; that the director and moderator made an error against contestant of five votes in counting the votes cast; that the incumbent had failed, neglected and refused to qualify as treasurer; and that contestant had filed his bond and had in all respects duly qualified. Incumbent appeared in the action, and upon his motion contestant was ordered to set out in his complaint, within ten days, the names of the voters who he claimed had voted illegally. Rev. St. 1913, sec. 2114. This order was not complied with.

The allegations in the complaint, or at least some of them, were material allegations, which it was incumbent upon contestant to prove at the trial, whether incumbent had formally answered or not. Notwithstanding the fact that this burden rested upon him, when the case was regularly called for trial, he, through his counsel, announced that he had no evidence to offer. The court therefore properly dismissed his action.

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

SIDNEY S. MONTGOMERY, APPELLEE, V. QUINTILLA M. DRESHER; DUNCAN M. VINSONHALER, INTERVENER, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,863.

1. **Mortgages: FORECLOSURE: DEFICIENCY JUDGMENT: APPLICATION OF FUNDS.** When it is made to appear to the court that there is money of a defendant in the hands of its clerk sufficient to pay a

judgment entered against him for deficiency in a foreclosure suit, and that if the fund is not applied to the satisfaction of such judgment plaintiff will be left without means of obtaining satisfaction thereof, the court is not required to look further than to ascertain that there are no liens of third parties upon the fund which would forbid such application. Having ascertained that fact, the court then, under the practice in this state which does not look to the form of actions, has the power to order the fund applied to the payment of such judgment.

2. Judgment: SATISFACTION: ORDER TO PAY MONEY INTO COURT. Where a judgment plaintiff has secured the payment into court of a sum of money, belonging to the defendant, amply sufficient to pay the full amount of his judgment and costs, it is error for the court to require the payment into court of further sums of money owing to defendant from third persons.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed in part, and reversed in part and remanded, with directions.*

Duncan M. Vinsonhaler, pro se.

McGilton, Gaines & Smith and *William Baird & Sons, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county to foreclose a mortgage securing two notes, given by defendant to one Becker, for $1,200 and $500, respectively. This was a second mortgage. Default having been made, plaintiff brought suit to foreclose the mortgage. Defendant appeared and defended the suit. Judgment went in her favor on the ground that plaintiff had not acquired the note and mortgage for a valuable consideration in due course of business, and for other reasons not necessary to repeat. On appeal to this court that judgment was reversed and the cause remanded, with directions to the district court to enter a decree of foreclosure. *Montgomery v. Dresher,* 90 Neb. 632. While the appeal was pending in this court, plaintiff applied to the district court for leave to commence an action at law against defendant on the notes, giving as a reason that defendant was a non-

resident; that she had obtained a judgment against one Brennan and one Becker, for $3,500; that defendant had no other property in the state except the lot described in the mortgage; that there had already been a foreclosure of a first mortgage by the National Life Insurance Company against the property, and the property was about to be sold under an order of sale therein; that defendant was about to collect her judgment, and that, if she succeeded in collecting her judgment and the property should be sold under the first mortgage, plaintiff would lose his debt. Leave was granted to commence the action at law. A separate action at law was thereupon commenced and garnishment process served upon Brennan and Becker. They answered, admitting their indebtedness to defendant under the judgment referred to. The court thereupon ordered them to pay into court $2,500, to abide the further order of the court, which was done. When the mandate from this court went down in *Montgomery v. Dresher, supra,* plaintiff applied to the district court in this suit for a deficiency judgment upon the notes, representing to the court that the property covered by the mortgage had all been consumed in the foreclosure suit upon the first mortgage. The court thereupon entered judgment in favor of plaintiff for the full amount of the two notes and interest, in the sum of $2,047.54, and awarded execution therefor. Execution was issued and returned *nulla bona.* Prior to the commencement of the law action intervener, who was attorney for defendant in her action against Brennan and Becker, had filed an attorney's lien for $1,250 upon the judgment which he had obtained for her in that action. After the garnishment proceedings in the law action and the filing of the answer of Brennan and Becker, admitting their indebtedness to defendant, and before the application for a deficiency judgment in this suit, intervener obtained from defendant an assignment of her judgment against Brennan and Becker, of which plaintiff had full notice. No further steps were ever taken by plaintiff in the law action, although he could have obtained full and complete payment of his notes in that action. The amount of his

claim was $2,047.54. He had secured the payment into court of $2,500 of defendant's money. Instead of pursuing his remedy at law in that action, which he had commenced by leave of court, he came back into this suit and obtained a judgment for deficiency upon the notes, as above set out. After an execution on the judgment had been returned *nulla bona,* he had garnishment process again served upon Brennan and Becker for the balance of their indebtedness to defendant upon her judgment against them, and the court in this suit ordered Brennan and Becker to pay that balance of $800 into court. With that payment in court, plaintiff would then have $2,500 in the hands of the clerk, as a result of his garnishment in the law action, and $800 as a result of his garnishment in this suit, a total of $3,300, plus a large amount of interest upon the Brennan and Becker judgment, from which to secure payment of a judgment of $2,047.54. See Mrs. Means' admonition to her husband *in re* "Congress land," in The Hoosier Schoolmaster.

Plaintiff then made application to the court in this suit, in which he showed the entry of the personal judgment for $2,047.54; alleged that no appeal had been taken from the judgment; that nothing had been paid by defendant on the judgment; set out the commencement of the law action; alleged that the notes, upon which the law action was based, were the same notes upon which the judgment in this suit was entered; set out the garnishment of Brennan and Becker, and the payment into court by them of $2,500, which sum he alleged was then in the hands of the clerk; alleged that the obligation on which judgment was entered in plaintiff's favor in this suit and the obligation set up as the cause of action in the law action are one and the same, and that the parties to the two actions are one and the same; that the only service in the action at law upon defendant was constructive service, and that she had not appeared therein; and moved the court that the money held by the clerk under the garnishment in the law action be applied in satisfaction of the judgment entered in this suit; that the clerk be ordered to pay

to plaintiff out of the $2,500, referred to, the amount of plaintiff's judgment, interest and costs, and to pay any surplus of said sum to defendant, and that upon such payment the law action be dismissed. Intervener thereupon filed his petition of intervention, in which he set out the facts substantially as we have already recited them, and alleged that, for the services rendered by intervener for defendant by reason of the numerous suits growing out of the above transaction, for which he has received no compensation, defendant assigned to him the judgment against Becker and Brennan; that plaintiff at all times was advised of the existence of intervener's lien for attorney's fees, and that when he caused garnishment to be issued in this suit plaintiff knew that intervener was the owner of the Becker and Brennan judgment. Wherefore he prayed for an order vacating and setting aside the writs of garnishment issued in this suit and enjoining and restraining plaintiff from further interfering with or delaying intervener in the collection of his judgment from Becker and Brennan, and for general equitable relief.

By its decree the court found that the judgment for $2,047.54 remains wholly unsatisfied, and that there is due plaintiff thereon the said sum, with interest and costs of suit, including the costs of the former appeal in this court; that $2,500 had been paid into court by Brennan and Becker in the law action; that there remained a balance due from Becker and Brennan on their judgment to defendant of $800, with interest from June 3, 1911, and that there is due interest on the $2,500 from June 3 to October 10, 1911; that intervener had a contract with defendant, by the terms of which he was entitled to one-third of the amount he should collect on her claim against Brennan and Becker; that intervener filed his lien against that judgment for $1,250; that subsequent thereto, to further secure intervener, defendant executed and delivered to him an assignment of her judgment against Brennan and Becker; that intervener had received, to apply on said indebtedness, $456.86; that prior to the entry of judgment in this suit plaintiff commenced the law action and ob-

tained the payment into court of $2,500; that defendant had failed to appear and answer in that action, and was served therein by publication only; that the proceedings in the law action were not abated by the rendition of the judgment in this suit, and that plaintiff's cause of action in said proceeding was on the same notes and cause of action as in this proceeding; that the right of plaintiff to a judgment on the notes had been fully determined in this suit, and that the $2,500 garnished and paid into court in the law action, or so much thereof as necessary, should be applied in satisfaction of the judgment, interest and costs of plaintiff entered in this suit; and decreed that Brennan and Becker pay into court the balance of $800 remaining unpaid on defendant's judgment, with interest; that the clerk "out of the funds in his hands, to wit, the sum of $2,500 garnished and attached in and by virtue of the proceedings in docket 114, page 231 (the law action), and the $800 and interest to be paid by the said Becker and Brennan, pay to this plaintiff, Sidney S. Montgomery, the amount due on his judgment, interest and costs of district and supreme court, heretofore rendered in this action, and the accrued costs in said case in docket 114, page 231 (the law action), and that after such payment said clerk pay over the funds so remaining in his hands to Duncan M. Vinsonhaler" (intervener). Intervener appeals.

Intervener in his brief states: "The only question for determination in this appeal is: 'Could the district court, upon motion of the plaintiff herein, order money to be paid in satisfaction of a judgment herein which had been paid to the clerk under attachment and garnishment proceedings in a suit at law where service was constructive, when judgment had not been entered in the suit at law?'" At first blush, the impulse would be to answer, "No," but under the facts shown in the record we are constrained to answer the query, as applied to those facts, in the affirmative. The parties to this suit and the parties to the action at law, when that action was instituted and the money paid into court, are the same, except that when the order was made, applying the money deposited with

the clerk in the law action to the payment of plaintiff's judgment in this suit, intervener had become a party to this suit and was asserting for himself, under an assignment from the defendant, the interest which defendant had in the litigation at the time the money was paid into court in the law action. If he were now in court as an innocent holder for value of defendant's interest in the judgment against Brennan and Becker, there would be great force in his contention, but the trouble is, when he took his assignment of the judgment from the defendant, whether he took it merely as additional security for his attorney's fee, as found by the court, or took it as an absolute assignment, as contended by him, he took it with full notice and knowledge of plaintiff's demand against the defendant. It is true there is force in his contention that, as to the $800 which the court ordered paid in by Brennan and Becker after he had obtained his assignment from defendant, his rights were superior to those of the plaintiff, but that question we are not called upon to decide, for the reason that it is entirely immaterial. The $2,500 paid into court under the garnishment proceedings in the law action is ample to pay plaintiff's demand in full, so that the only question we need determine is the simple question stated by intervener in his brief. As we have already stated, after the money was deposited with the clerk in the law action, plaintiff took no further steps therein. He did not prosecute that action to final judgment, and, as intervener contends, he probably obtained nothing more than an inchoate lien upon that fund. But the fund had been paid into court to be held for the satisfaction of any judgment which plaintiff might obtain against defendant upon the notes he held against her and which constituted the cause of action in each suit. To the extent of plaintiff's demand against defendant, no one can complain of the application the court is making of that fund except the defendant, with this exception, that, as to the extent of his attorney's lien, intervener had a claim to that fund which was prior to plaintiff's right under his garnishment proceedings. If the record now showed that by ap-

plying a portion of that fund to the payment of plaintiff's notes intervener would suffer a loss of any part of his attorney's lien, then to the extent of that loss he might object to such application being made. But the evidence shows that intervener will not suffer any such loss by reason thereof. The surplus of the $2,500 over and above the amount of plaintiff's judgment, added to the $800, which is still owing by Brennan and Becker, is ample to pay intervener all that is due him under his attorney's lien. We think, therefore, that when the court, in this suit, became advised of the fact that there was money in the hands of its clerk, sufficient to pay plaintiff's demand, and that, if it were not so applied, plaintiff would be left without any means of obtaining satisfaction of his judgment, it was not required to look further than to ascertain that there were no liens of third parties upon the fund which would forbid such application. Having ascertained that fact, the court then, under our practice which does not look to the form of actions, had the power to order the fund applied. That plaintiff had reached this point by a circuitous and expensive route could not affect the right of the court to enter the judgment; but we think the court should have inquired into the matter and ascertained whether or not plaintiff had made a lot of unnecessary costs by instituting the action at law and then switching back to the suit in equity, and should have taxed all such unnecessary costs to plaintiff. That unnecessary costs were made is clear. As already intimated in this opinion, plaintiff could have obtained full payment of his demand in the law action. He had procured the payment into court of a sum of money ample to satisfy his demand, and he should have obtained it there. When he came back into this suit, all costs subsequently made herein, except the entry of judgment on the notes, were unnecessary costs, which he should pay.

The judgment of the district court, as to the application of the funds in the hands of the clerk, is affirmed. In so far as it orders the garnishees to pay an additional $800 into court, it is reversed. The cause is remanded to the district court, with directions to tax all costs in this suit,

subsequent to the entry of judgment upon the notes, to the plaintiff.

JUDGMENT ACCORDINGLY.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

SIDNEY S. MONTGOMERY, APPELLEE, V. QUINTILLA M. DRESHER; DUNCAN M. VINSONHALER, INTERVENER, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,862.

Parties: INTERVENTION: DISMISSAL. Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, may become a party to such action, and when he has become a party thereto it is error for the court to dismiss his petition of intervention prior to the final determination of the action on the merits. Rev. St. 1913, secs. 7609, 7610.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Duncan M. Vinsonhaler, pro se.

McGilton, Gaines & Smith and *William Baird & Sons, contra.*

FAWCETT, J.

This is the action at law to which reference is made in *Montgomery v. Dresher ante,* p. 104. The only judgment entered in this action was one dismissing intervener's petition of intervention, with prejudice. The one question to be determined, then, is: Can such judgment be sustained? In the findings upon which the judgment is based the court finds that there is a fund of $2,500 in the hands of the clerk which has been paid in under garnishment proceedings as the money of defendant, and which is being held to abide the further order of the court; that the

amount of plaintiff's demand against the defendant is $2,047.54; that intervener had a lien upon the judgment of defendant against the garnishees who paid the fund into court, and that the attorney's lien had been filed before the garnishment proceedings were had. It is clear from these findings that intervener has an interest in the matter in litigation which he is entitled to have adjudicated in the final determination of the action. It was therefore error for the court to dismiss his petition of intervention. Other questions are discussed in briefs of counsel, but, as the judgment dismissing the petition of intervention is the only judgment which was entered, such discussion is beside the mark.

For the error indicated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

H. HERPOLSHEIMER COMPANY ET AL., APPELLEES, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,666.

Opinion on motion for rehearing of case reported in 96 Neb. 154. *Rehearing denied.*

SEDGWICK, J.

The opinion in this case is reported in 96 Neb. 154. A motion for rehearing and a brief in support thereof has been filed. These are evidently based upon a misapprehension of the meaning and scope of the opinion. Defendant concedes and asserts, as in its original brief, that "the jurisdiction to affect the service, whether it should be on Twelfth street or Fourteenth street, resided entirely with the commission. * * * This part of the decision is manifestly right."

The contention is that the defendant company had the power and right to change the routing of its cars on its own initiative, and was not required to obtain permission of the state railway commission so to do. The brief in behalf of plaintiff based his contention mainly on the proposition that a street railway company, after it has obtained the permission of the city, and has constructed its lines and inaugurated its service, cannot abandon those lines and refuse to render the service, citing numerous authorities sustaining that position, among them our decision in *State v. Sioux City & P. R. Co.*, 7 Neb. 357, and *City of Potwin Place v. Topeka R. Co.*, 51 Kan. 609, *State v. Bridgeton & Millville Traction Co.*, 62 N. J. Law, 592, and *Loader v. Brooklyn Heights R. Co.*, 35 N. Y. Supp. 996. In our decision, above cited, it was held that, where a railroad company has received a grant of land from the state, upon condition that it would build a railroad from one town to another, it has no authority whatever afterwards to abandon any portion of such line and take up and remove the track. In the Kansas case it was said: "By the provisions of the ordinance, the Rapid Transit Company obtained the right to construct its roadway in the public streets, to maintain and operate it, to transport passengers and parcels by means of electrical power, to collect charges and tolls therefor. These privileges were not granted to the company solely for the company's benefit, but rather that the citizens of the plaintiff city might have the benefit of an improved mode of travel—that they might enjoy the benefits of one of the inventions of the age. * * * The company accepted the provisions of the ordinance, and constructed its road under the leave thereby obtained. May it now disregard the obligations imposed on it by its terms?" In these and many other cases the companies were compelled to maintain the service which had been established. We have not decided in this case that the defendant company cannot establish new lines of service upon such streets as the city may permit, nor that it cannot initiate necessary changes in the management of its business. It is not essential that every minor change in

the conduct of the traffic, or in the service rendered, or in other matters of detail concerned with the operation of the line, should be preceded by an application to the railway commission for permission to make the change. The opinion does not so hold. The point decided is that the company cannot make such changes in the routing of its cars as the evidence in this case shows were made or contemplated, without first obtaining the approval of the commission. South street is an important street of the city, and College View an important suburb. The travel between those localities and the residences and business places on Twelfth street is also important. Direct intercourse of that kind must be abandoned if this change is made. This would amount to an abandonment of a substantial part of the service upon that line. When the inconvenience of the patrons of the road directly interested is considered, and the effect upon property values, and similar considerations, the defendant company must have known that many people would be interested, some perhaps favoring, and others opposing, the change. The officers of the company, being principally concerned for the accommodation of its patrons, and not being interested in the changes of property values, would, it is to be supposed, naturally look for some disinterested authority to satisfactorily arrange the matter, preserving, as far as possible, the rights of all parties interested. This is the peculiar function of the state railway commission. Being administrative in its nature, this function is not within the province of the courts, and the law has wisely confided it to that body, instead of leaving it to the company itself, whose officers might under some circumstances have interests and motives not entirely in harmony with the best interest of the general public, or even with a majority of those more directly affected.

If we should assume in this case to define in general the precise limits of the authority of the railway commission even in the matter of routing cars over the tracks of the defendant company, such definitions would be worthless as a future guide, since they would be dicta only. Much

less can this court, as suggested, lay down general rules for the railway commission in the regulation and control of common carriers.

The motion for rehearing is therefore

OVERRULED.

HAMER, J., dissenting.

I think the opinion gives the railway commission more power than is contemplated by the constitution and the statute, and that it permits the invasion of private rights by such commission and is an abdication by the courts of the state of the power conferred upon them by the people.

WALTER B. PRUGH, APPELLANT, V. MARY P. SEARCY ET AL., APPELLEES.

FILED OCTOBER 30, 1914. No. 17,757.

Adverse Possession: SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is found to be sufficient to establish the defense of open, exclusive and adverse possession for more than ten years prior to the commencement of the action.

APPEAL from the district court for Deuel county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland, James T. Keefe and *Leavitt & Hotz,* for appellant.

Wilcox & Halligan, contra.

SEDGWICK, J.

In May, 1894, the Union Pacific Railway Company conveyed the quarter section of land in controversy in this case to one John Long. There is no evidence that Mr. Long ever took actual possession of the land, or that he ever paid any taxes thereon after he received his deed. In

September, 1910, Long conveyed the land to one Jankee, and a few days later Jankee conveyed it to this plaintiff. The plaintiff began this action on the 20th day of March, 1911, to quiet his title and cancel an alleged tax deed. The trial court found in favor of defendants, and plaintiff has appealed.

In January, 1894, Albert B. Persinger purchased this land at sheriff's sale upon foreclosure of tax liens in behalf of Deuel county. This is the same foreclosure involved in *Armstrong v. Johnson,* p. 119, *post.* Afterwards Mr. Persinger conveyed the land to the defendant Mary P. Searcy, his daughter. The defendant Mary P. Searcy insists that she has valid title to the land through the said sheriff's deed, and also that she and her grantor have had exclusive, adverse possession of the land for more than ten years prior to the commencement of this action. In this case the defense of adverse possession is clearly proved. Mr. Persinger testified that when he purchased this land, in January, 1894, he was the owner of the quarter section of land lying immediately south thereof and the quarter section of land immediately east thereof, and held the section north under a lease from the state, so that this land was surrounded on three sides by the plaintiff's lands. He also testified that at the time he purchased it there was a fence on two sides of this land, enclosing the school section north and the three quarter sections above stated, including the quarter section in controversy, and that immediately after he purchased this quarter section, in January or February, he built another fence, so that these lands were all enclosed on three sides, and that he kept his cattle and horses, a large herd, upon these lands, and that he employed a herder continually to prevent them from escaping on the unenclosed side. He was asked if there was no land in this enclosure that he did not own, and answered, "There was very little I did not own or lease," and explained that there was one tract for which he had no deed or lease, but had the written consent for its use of the owner, who was a nonresident, so that it appears beyond question that he had for

more than ten years prior to this action continuous, open, exclusive and adverse possession of this land.

The judgment of the district court is therefore right, and is

AFFIRMED.

ROSE, J., not sitting.

ANNA B. JANKEE, APPELLANT, V. SAMUEL ROBB ET AL., APPELLEES.

FILED OCTOBER 30, 1914. No. 17,758.

Adverse Possession: SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is found to be sufficient to establish the defense of open, exclusive and adverse possession for more than ten years prior to the commencement of the action.

APPEAL from the district court for Deuel county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland, James T. Keefe and *Leavitt & Hotz,* for appellant.

Wilcox & Halligan, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Duel county to quiet title to a quarter section of land in that county. The defendants claimed title under the same foreclosure proceedings involved in *Armstrong v. Johnson,* p. 119, *post.* The trial court found for the defendants and dismissed the action, and plaintiff has appealed.

It is not necessary in this case to discuss the validity of the foreclosure proceeding relied upon by the defendants, since the defendants have alleged and proved a complete defense by adverse possession. In 1898 the defendant Samuel Robb was the owner of and resided upon a quarter sec-

tion of land adjoining the land in dispute, and also controlled by lease several other adjoining quarters, and in that year, or the following year, he enclosed the said quarter sections of land so owned and leased by him, and also this quarter section in controversy, with a fence, and has ever since that time had exclusive adverse possession of all the lands so enclosed, including this quarter. In January, 1901, one or two years after he had so enclosed and taken possession of this land, he purchased the quarter in controversy at sheriff's sale, and has since paid the taxes thereon. Since this action was not begun until in March, 1911, the defendants had been in open, exclusive and adverse possession under claim of ownership for more than ten years when the action was begun.

The judgment of the district court is therefore right, and is

AFFIRMED.

ROSE, J., not sitting.

MARTIN ARMSTRONG, APPELLANT, V. SWAN P. JOHNSON ET AL., APPELLEES.

FILED OCTOBER 30, 1914. NO. 17,759.

Adverse Possession: SUIT TO QUIET TITLE. An action to quiet title to real estate is barred by the statute of limitations, when the defendant has been continuously in open, exclusive and adverse possession of the land for more than ten years prior to the commencement of the action; the plaintiff not having been under any disibilitv during that time.

APPEAL from the district court for Deuel county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland, James T. Keefe and *Leavitt & Hotz,* for appellant.

Wilcox & Halligan, contra.

SEDGWICK, J.

This plaintiff contracted with the Union Pacific Railway Company, for the purchase of the land in controversy, and afterwards, in 1894, made his final payments and obtained the deed. While he held the land under contract, he paid two years' taxes thereon; but after 1894 he paid no taxes, and, never having seen the land, gave no attention to it until one of the attorneys now acting for him in the case called his attention to it some 16 or 17 years after he had received the deed. In March, 1911, he began this action in the district court for Deuel county to redeem from tax sales and quiet his title. The trial court found the issues in favor of defendants and dismissed the action, and the plaintiff has appealed.

In January, 1901, the defendant Johnson bought the land at sheriff's sale upon foreclosure of tax liens in an action brought by Deuel county. The defendant relies upon his sheriff's deed as conveying good title, and also alleges that he had been in open, exclusive and adverse possession of the land for more than ten years before this action was begun. The tax deed is assailed on various grounds; but, if the defense of adverse possession is established, it becomes unnecessary to discuss the validity of the tax deed. It appears from the evidence that when the defendant purchased this land he owned a contiguous quarter, lying northwest of this land, in section 14. He had resided upon his quarter section in section 14 with his family for many years. His residence was within less than 40 rods of the land in controversy. He held the east half of section 13 under lease, so that the land in dispute lay between his residence and the half section which he held under lease. From the time he bought this land he used it, as he did his own and the land which he had leased, for haying purposes and for herding his cattle and horses thereon. He also used in the same way the northwest quarter of section 13, but it does not appear whether he had leased that quarter, or upon what ground he appropriated its use. He notified his neighbors to keep their stock off from this land, and asserted his right to the ex-

clusive use thereof. He had paid all taxes on the land since he purchased it, and testifies that he considered it as his land from the time he purchased it at sheriff's sale. He paid something over $100 for the land, and the evidence is that at that time the amount he paid was nearly the full value of the land. Neither this plaintiff nor any one else had ever questioned defendant's right to this land until this action was begun. This evidence is not contradicted, and there is no evidence in the record that any one else has used or could use this land in any way since the defendant purchased it. The evidence as to open, exclusive and adverse possession of this land was given by witnesses in open court. The trial judge saw these witnesses and heard their testimony, and we conclude that the trial court was right in believing these witnesses and in his construction of their testimony.

The plaintiff, to support his contention that the defendant's possession was not so exclusive and adverse as to defeat the plaintiff's action, cited *Lanning v. Musser,* 88 Neb. 418; *Schwartz v. Anderson,* 92 Neb. 603; *Delatour v. Wendt,* 93 Neb. 175; *Risher v. Madsen,* 94 Neb. 72; *Moler v. Castetter,* 94 Neb. 106. Some of these cases support the conclusion that we have reached in this case, and others are so easily distinguished in their facts that it seems unnecessary to discuss them.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., dissents.

ROSE, J., not sitting.

OMAHA, LINCOLN & BEATRICE RAILWAY COMPANY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED OCTOBER 30, 1914. No. 18,255.

1. **Municipal Corporations:** CONTROL OF STREETS: USE BY RAILROADS. Section 5942, Rev. St. 1913, should not be construed to authorize a railway company to select any street of the city it may choose for its right of way, and obtain control thereof by condemnation proceedings or by contract with the city. The city cannot, by contract or in any other way, deprive itself of the power to control its streets and to establish and maintain the grades thereof.
2. ———: ———. The city authorities have control of its streets, and have power "to compel railways to conform tracks to grades at any time established." When the city has established the grade of a street, the courts will not interfere with such action unless it clearly appears that thereby the rights of others have been seriously injured, and that such injuries are so wholly unnecessary that no reasonable mind could entertain a contrary belief. The provisions of section 5942, Rev. St. 1913, do not alter this rule.
3. ———: ———: GRADING: INJUNCTION. It is the duty of the city authorities, with the assistance of their engineers, to plan and adopt a sewerage system. When the evidence is conflicting as to the advisability and practical working of the system planned and adopted by the proper authorities, the courts will not enjoin the grading and paving of the streets pursuant to that plan, nor restrain the city authorities from requiring railway tracks along such streets to conform to such grade, on the ground that the streets and adjacent properties will not be properly drained.
4. ———: STREETS: USE BY RAILROAD: CONFORMITY TO GRADE. When a city of the first class, having more than 40,000 and less than 100,000 inhabitants, enacts an ordinance granting a railway company the right to construct its road in a street of the city, and provides in that ordinance that the railway company shall conform its tracks to grade then existing or that shall afterwards be established, and afterwards enacts an ordinance establishing for the first time the grade of the street upon which the tracks have been laid pursuant to the first ordinance, no other ordinance requiring the railway company to conform its tracks to the grade so established is necessary.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed and dismissed.*

F. C. Foster and *D. H. McClenahan,* for appellant.

C. C. Flansburg and *Leonard A. Flansburg, contra.*

T. S. Allen, amicus curiæ.

SEDGWICK, J.

In March, 1904, the city of Lincoln enacted an ordinance granting to this plaintiff, the Omaha, Lincoln & Beatrice Railway Company, the right to use Y street in the city of Lincoln for its tracks. The ordinance required the plaintiff to pay an annual occupation tax, and to conform its tracks to the grades which were then established or which might thereafter be established, and to accept in writing the ordinance as a contract, and give bond in the sum of $10,000, guaranteeing a compliance with the terms of the ordinance. The ordinance was duly accepted by the plaintiff and the bond given. At that time no grade had been established on Y street between Eighteenth and Twenty-seventh streets, and the maps and profiles filed by the plaintiff with the city authorities showed an elevation of its tracks at Twenty-first and Y streets of 1 7/10 feet above the natural grade. The plaintiff then filled the right of way at Twenty-first and Y streets about 16 inches above the natural grade and constructed its road accordingly. In August, 1911, the city council enacted an ordinance which provided for the paving of Y street from Twenty-first to Twenty-seventh streets and by ordinance established the grade thereon. The grade so established was about an inch above the natural grade of the street, but the ordinance contained no provision requiring the plaintiff to lower its tracks to conform with the grade so established. Afterwards, in May, 1912, the council ordered the street paved, and the contract for paving the street was entered into by the city with the Ford Paving Company on August 19, 1912. Pursuant to the contract the contractor began the work of paving the street and paved Twenty-first street from the south to the south side of Y street. On the 21st of October, 1912, the plaintiff filed a petition in the district court for Lancaster county against

the city and the contractor, asking for an injunction restraining the defendants "from interfering with the rails, ties, or grade of plaintiff's said railway on said Y street," and from interfering with the operation of the plaintiff's railway over and upon said Y street. Summons thereon was served on the 23d day of October. No temporary injunction was allowed or asked for. A motion was filed by the defendant on the last day of December, 1912, to require the plaintiff to attach to its petition a copy of the alleged agreement between the plaintiff and the city. There was no ruling upon the motion, and, the attorneys who had begun the action for the plaintiff having withdrawn from the case, other attorneys filed an amended petition in April, 1913. This petition asked for a temporary injunction against the defendant, but it does not appear that the same was allowed or that any hearing was had upon the application. A general demurrer was filed to this amended petition, which was overruled, and the city filed an answer immediately. Thereupon still another attorney, who had been employed by the plaintiff, filed a second amended petition, which also asked for a temporary injunction, but the case immediately proceeded to trial and no temporary injunction was allowed. On the 26th day of May, 1913, the district court made special findings and entered a decree enjoining the defendant, the city of Lincoln, substantially as prayed, and the defendant has appealed.

The court found that Y street from Eighteenth to Twenty-third street is low ground and subject to overflows from flood-waters, and especially from back-waters from the Antelope creek, and that the plaintiff's tracks have been interfered with at times thereby; that the plaintiff, relying upon the profile and its right to maintain the elevation as shown therein, constructed its road and tracks, and has been operating the road and serving a portion of the city and the outlying districts, carrying 1,100 passengers a day, and that the track is in the "low pocket in the Antelope valley between Twenty-second and Twenty-third streets, west to beyond Twenty-first street, is boggy and

marshy," and that plaintiff's track is some 18 inches above the natural surface of the ground, and the plaintiff has placed cinders and other material under the ties in the embankment and roadway, and that the street has been little used for travel except on plaintiff's trains; that the track of the Missouri Pacific Railway crosses Eighteenth street, and that the elevation of their tracks has not been fixed or established by any ordinance, and they have not been required by ordinance to conform to the established grade, and their tracks are several feet above the natural surface and the established grade of the street; that the ordinance, enacted in March, 1910, would require the lowering of plaintiff's tracks in the intersection of Twenty-first and Twenty-second streets with Y street about 18 inches, "to the natural surface of Y street at said intersection;" that the ordinance establishing the grade of Y street will make that street the lowest street "from Dudley on the north and X street on the south, and will cause the surface waters to flow into said Y street," and that to compel the plaintiff to bring its track down to the proposed grade "will remove and destroy the foundation for its embankment," and that a large proportion of the property owners, some 40 in number, abutting on or adjacent to said street have protested against the lowering or fixing of the grade below the profile and elevation of plaintiff's tracks.

Of course, if the plaintiff constructs the paving between its rails as the law requires it will first lay a concrete foundation therefor, and so will not be damaged by substituting this foundation for the cinder foundation it now has. If the city can in ordinary cases only require a railway company to conform its tracks to grade by ordinance duly enacted, and if, after an ordinance is duly enacted, as in this case, fixing the grade and requiring the streets to be paved, a second ordinance is necessary to require the railway company to place its paving upon the grade, we have that second ordinance in this case, since the original franchise ordinance under which the plaintiff laid its tracks provides that the plaintiff shall conform its tracks

to the grades then existing or to be established, and there is a general ordinance of the city requiring this to be done. It would seem that no further ordinance of the city could possibly be necessary for that purpose.

The court also found that in seasons of freshet when waters collect it will be impossible to maintain and operate the track at such grade, and will prevent the operation of cars over and upon said track at such times, and that "no adequate provision has been made for taking care of said flood and surface waters, or securing their discharge from said track, and, by reason of said grade, no proper arrangement or sewer connection can be put into effect to carry off said water or relieve said flood condition, thereby rendering that portion of its roadbed useless at such times, depriving the people of its service; * * * that the establishment of the grade on Y street below the profile and elevation of the plaintiff's track will not benefit any one, and such grade is unnecessary, is contrary to the public interest," and that "the construction of the railroad aforesaid in accordance with the profile and the maintenance of its railroad with the approval and consent of the defendant vested in plaintiff the right to operate and maintain its said line of railway on the grade as established by said profile, and that said defendant city is estopped to question or interfere with the same, except for the public good and by an ordinance duly enacted; and the court finds that no ordinance whatever has been enacted by the city, instructing or directing the plaintiff to remove its track on said Y street to the established grade; and, by reason of the aforesaid, the plaintiff is entitled to a permanent injunction." These findings suggest the vital question in this case. There is no contention that to require the plaintiff to lower its tracks at Twenty-first street so as to conform to the established grade of the paving is in itself an unreasonable hardship. It is only because the plan of the drainage and sewerage system is supposed to be defective and because of the results anticipated in that respect that complaint is made.

"The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise. Such power may be asserted directly by the legislature, or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The power of the legislature over private property is not absolute. But, while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the lawmaking power of the government respecting the wisdom or necessity of particular measures." *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549. These principles are peculiarly applicable to the case at bar. This court cannot say as matter of law that, by establishing the grade of the proposed paving at the natural grade of the surface of the ground, the city authorities have exceeded their power, unless it so clearly appears that thereby the rights of others have been seriously injured and that such injuries were so wholly unnecessary that no reasonable mind could entertain a contrary belief. If the sewerage system is sufficient to carry off the water and substantially prevent it from accumulating on the plaintiff's tracks, as it is required to construct them, no substantial injury has been done the plaintiff. The case then resolves itself into the question as to the plan and construction of the drainage system.

The paving district organized by the ordinance, known as No. 217, includes Twenty-first street from Vine street to Y street, and Y street from Twenty-first to Twenty-seventh streets. The plaintiff's complaint is in regard to the conditions existing by the established grade at the intersection at Twenty-first and Twenty-second streets with Y street. At this point the established grade is only a fraction of a foot above the natural surface. The only evidence

on that point that we have found in the record is in the testimony of the assistant engineer, who testifies that it is from 1/10 to 4/10 of a foot above the natural surface. The tracks of the plaintiff, if the action of the city is upheld, will have to be lowered to about the natural surface at that point. It is contended by the plaintiff that the grade at that point is low, and ascends both toward the east and toward the west, thus forming a "pocket" at that place that will, in times of even ordinary rains, be filled with water so as to cover the tracks of the plaintiff, as well as a considerable section of the surrounding territory, and that this will be so great an injury to the plaintiff and to lot-owners as to make the action of the city in so establishing the grade so unreasonable as to be void. The plaintiff produced and examined five expert witnesses, and the case rested upon their testimony. The principal question investigated was whether the city had adopted a proper and feasible sewerage system for that locality. Mr. Towl, an engineer of some considerable experience, who is now employed in that capacity in the city of Omaha, and who examined the situation here on two different days before he testified, stated that the system adopted by the city in that locality is not practicable or feasible; that Y street at the intersection of Twenty-first street ought to be elevated, so as to make a continual slope from east to west. He stated his reasons and his conclusions quite at large, and his evidence no doubt seems quite plausible to a lawyer who is not an expert in those matters. His principal objection is to the openings into the sewer. He testifies that they are not large enough, not in the right shape, and are not properly located. His evidence is supported emphatically by Mr. Hicox, who seems to be a very competent engineer, and who looked the situation over just before he testified. He is also supported in a general way, but not so emphatically, by other competent engineers. On the other hand, Mr. Bates, the assistant city engineer of Lincoln, testified fully in regard to existing conditions, and in regard to the plan and conditions of the present system of sewerage, and also to some

extent as to proposed or contemplated changes and additions to the sewerage system. He has been in his present position as assistant engineer for some time, and shows in his evidence a thorough knowledge of the conditions existing and of the sewerage system as it is already constructed, as well as contemplated additions thereto. His evidence as to the elevations of the natural surface throughout that part of the city and of the established grade in question was very full and complete, and is the evidence upon these points in this case without contradiction. It appears from his evidence that the natural surface of Y street descends gradually from the east to Twenty-first street, and then rises for more than 200 feet. At 475 feet west of Twenty-first street the elevation is about three feet above Twenty-first street. This rise of ground, called a knoll in the evidence, extends about 100 feet north and about 200 feet south of Y street.

There is an 8-inch sanitary sewer on Y street at the crossing of Twenty-first street, and a 15-inch storm sewer, which empties into a 21-inch sewer about a half block west of Twenty-first street. This sewer continues west to Seventeenth street, and connects with the main sewer, which runs north to Salt creek. It also connects at Seventeenth street with an 18-inch sewer, which runs south 200 feet to Antelope creek. The fall of the sewer is one foot to a thousand. If the city authorities and the engineer are making the mistake that some of this evidence would indicate that they are making, it is indeed a very serious matter. If their sewerage system is wrongly planned and improperly constructed so as to unnecessarily overflow the paving of this street when completed and cover the tracks of the plaintiff and the surrounding lots with water, and if these mistakes and defects cannot be remedied by the city, it would seem that such a construction would subject the city to damages that it is well worth while for the authorities to pause and consider.

In *City of Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, the supreme court of that state, after stating the

facts in the case, said: "Under such a state of facts, we think the well-settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested." In that case the city raised the grade of the street where the railroad company's tracks were located to such an extent, as stated by the court in the opinion, "as to absolutely destroy the franchise." The city raised the grade above the natural surface, and "at the same time the city raised the grades of other streets in the vicinity which were crossed by the railroad tracks aforesaid to such an extent as to make it impossible for the railroad companies to reconstruct their tracks upon said right of way." The purpose of the city appears to have been to compel the railroad company to entirely abandon its location, without providing any other location for its tracks.

There might be a case in which it could be so clearly demonstrated that the plan adopted was so absolutely impracticable that a court would be justified in interfering, but planning and adopting sewer systems is not a judicial matter, and the law leaves such matters to the city council as they may be advised and assisted by their engineers. If the property owners are damaged by the change of grade, the law affords them a remedy, but not by injunction. The evidence is conflicting as to the feasibility of the plan of drainage which the city had adopted. If it should prove inadequate, the mistake will undoubtedly be corrected and the damages caused thereby liquidated.

Section 5942, Rev. St. 1913, provides: "If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way or ground of any kind, or any part thereof," the public authorities and the company may "agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if such parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such

road, street, alley or other public way or ground, such company may appropriate" the same by condemnation. The plaintiff construes this statute in these words: "If no contract had been made at that time, plaintiff could, by condemnation proceedings, have taken so much of Y street as was necessary, upon making compensation to the city and abutting owners, and as thus condemned, under the statute quoted, and so far as it took for its own purposes, the city would lose the power or control of the location of the road and its grade."

Plaintiff says: "Even now plaintiff (if it cannot 'agree' with the city) can condemn and maintain its tracks at the elevation sought, under the statutes of the state, although the physical conditions were not sufficient to justify the maintenance of its present elevation. Wherever an elevation is reasonably necessary for the maintenance and operation of the road, that elevation may be secured, first, by contract, if possible, but, failing, in that, by condemnation. For, when plaintiff has once condemned a right of way in the street and paid for that right, the city is powerless to prevent the maintenance of the very right it has paid to secure; and its right under the contract is precisely the same. The purpose of this legislation was to confer added power upon the municipality. Without it, the city could have regulated the entrance of a railroad and the occupation of its streets, over which it had full control. The legislature therefore intended that the city should have power by 'agreement' to surrender control of the streets, or, failing to agree, the railroad should have the right to condemn, regardless of the city's control. The statute therefore authorized the city to surrender its control."

It seems strange that any one should so construe the statute. Can it be supposed that a railway company can select any street of a city it may choose and by condemnation or any other process obtain control thereof? Can it place any tracks and grades therein it may see fit, and maintain them? The city under the statutes has entire control of the streets. If the statute authorizing condem-

nation of a street by a railway company means anything more than to give it the means of having the pecuniary damage to the city and property owners fairly adjusted when agreement is impossible, it cannot, when considered with other statutes, or when considered in the light of the general policy of the state, be intended to allow a railway company to select at will the street or streets of a city upon which it will lay its tracks, or to give it any right in any street, except subject to the control and regulation of the city, and subject to the equal right of the public in the use of the street.

The statute also provides that the city shall have power: "To regulate levees, depots, depot grounds and places for storing freight and goods, and provide for and regulate the passing of railways through the streets and public grounds of the city, reserving the rights of all persons injured thereby." Rev. St. 1913, sec. 4422.

"To compel railways to conform tracks to grades at any time established, and if lengthwise in a public way to keep them level with street surface, to compel railways to keep streets open, construct and keep in repair ditches, drains, sewers and culverts along or under their right of way or tracks, and lay and maintain paving of their whole right of way on paved streets." Section 4471.

"To make all such ordinances, by-laws, rules and regulations not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this section granted, maintaining the peace, good government, and welfare of the city, its trade, commerce and manufacturies." Section 4473.

"The mayor and council shall have supervision and control of all public ways and public grounds within the city, and shall require the same to be kept open, in repair and free from nuisances." Section 4475.

"The mayor and council shall have power by ordinance to provide for grading or repairing of any street or public way, construction, renewal or repair of bridges, culverts and sewers." Section 4523.

Under these statutes a railway company cannot select any street of a city that it chooses and grade its tracks to any extent it may desire. The city has general control of its streets and of the grades thereof. It is not necessary to determine in this case the exact limits of the rights and powers of a railway company under section 5942. The franchise ordinance under which the plaintiff laid its tracks on Y street itself provides that the tracks shall conform to grades established or which might thereafter be established. Establishing the grade of Y street at or near the natural surface of the street is not necessarily unreasonable. That the plan of drainage adopted leaves Y street lower than adjoining streets does not necessarily make the plan impossible or impracticable. If the sewers already laid or contemplated are improperly constructed or are insufficient, it does not necessarily follow that these defects cannot be remedied. The presumption is that the city will provide ample drainage for its streets. We cannot say from this evidence that the plan adopted is so clearly impossible as to require the courts to interfere with the discretion and judgment of the city authorities.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

BARNES, J., dissenting:

I cannot concur in the majority opinion. The findings contained therein and the evidence show beyond question that Y street from Eighteenth to Twenty-third is in low ground and is subject to occasional overflows from flood-waters, especially back-waters from Antelope creek, which have interfered with the operation of the plaintiff's track at that point; that, in reliance upon the profile and its right to maintain its track at the elevations shown thereby, it has extended its road beyond the city limits seven miles, has expended a large sum of money in so doing, and since 1906 has operated its road, serving a portion of the city and outlying districts not reached or served by any other

railway, and has been carrying about 1,100 passengers daily; that there is a low pocket at Twenty-first and Y streets which is boggy and marshy; that the plaintiff built its track across such marsh according to its profile, some 18 inches above the natural surface of the ground, and placed cinders and other material under the ties in the embankment and roadway to give it sufficient stability to make its operation safe and possible.

It further appears that fire hydrants have been inserted on Y street upon a grade level with the top of the plaintiff's track, and under the track is a sewer connection with manholes on a grade level with its surface; that Y street has been little used except for travel on plaintiff's trains; that the tracks of the Missouri Pacific Railway, on what would be X street if the same was opened, and those of the Chicago, Rock Island & Pacific Railway cross the plaintiff's tracks in a northerly direction along Eighteenth street a part of the way; and the elevations of said roads and tracks are not fixed or established by any ordinance, nor are said roads or the tracks of either of them required by ordinance to conform to the established grades of the streets where they intersect, but are several feet above the natural surface and the established grade of said streets; that the grade which requires the lowering of plaintiff's tracks 18 inches at the intersection at Twenty-first and Y streets will make Y street the lowest street from Dudley on the north to X street on the south, and will cause the surface waters to flow into and stand in Y street; that the defendant is about to interfere with the tracks of the plaintiff at Y street, and tear up and destroy and lower the same about 18 inches, and thus compel the plaintiff to bring its tracks down to the proposed grade, which will remove and destroy the foundation of the plaintiff's embankment; that in seasons of freshet when waters collect it will be impossible for the plaintiff to maintain and operate its track and railroad at such a grade.

It clearly appears that no adequate provision has been made for taking care of the flood and surface waters or securing their passage from plaintiff's track; that a por-

tion of the plaintiff's roadbed will thereby be rendered useless, and the public will be deprived of its train service; that the establishment of a grade on Y street 18 inches below the profile and elevation of the plaintiff's track will not benefit any one; that such grade is unnecessary, is contrary to the public interest, and a large portion of the property owners, some 42 in number, abutting on or adjacent to said street, have protested against the lowering or fixing of the grade below the profile and elevation of the plaintiff's tracks; that the defendant should be estopped to interfere with the plaintiff's grade, except for the public good and by an ordinance duly enacted in that behalf, and it appears that no ordinance whatever has been enacted by the city instructing or directing the plaintiff to lower its tracks on Y street to the grade thus established.

As I view the record, the foregoing facts are established by a preponderance of the evidence. The district court made certain findings which accord substantially with the foregoing, and I am unable to see how its findings could have been otherwise.

The supreme court of California in *Pacific Telephone & Telegraph Co. v. Eshleman,* 166 Cal. 640, 663, said: "But in the exercise of the police power in the regulation of public utilities, while each case which is rested upon the exercise of that power must be subject to its own individual consideration, there are certain fundamental principles which are not disputed and which govern all. The first of these is that this power goes merely to the *regulation* of the public utility, and that when an order passes beyond proper regulation it amounts to a taking of the property, and the order is then referable, not to the police power, but to the power of eminent domain. * * * Another principle, quite as important and quite as fundamental, is that 'taking' of property within the meaning of the constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use."

The police power can never be exercised to do more than to regulate the owner's use, and cannot extend to the taking of his property from him or dispossessing him of its use and control. A street is for the use, convenience, comfort, and safety of all the people of the city—for all the users of it. Therefore, before the rights of the users of a city can be interfered with, there must be some necessity for the interference of the police power by the state. After enumerating the extent and authority of the police power, the supreme court of the United States in *Lawton v. Steele,* 152 U. S. 133, said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. The facts of this case show that the plaintiff carries more than 1,100 passengers daily, not accessible to other roads; that the street is little used for travel or traffic aside from such use; that the interests of the public generally, as well as the abutting owners, have been disregarded and have not been considered; that the grade established at Twenty-first and Y streets will make a cesspool in floods and freshets. This is not only unduly oppressive upon individual lot-owners abutting upon said street, but upon the general public as well, and it is shown by the testimony that the accomplishment of that purpose is destructive and will defeat every purpose for which the paving is laid. The testimony discloses that to lower the grade of the plaintiff's railroad to the proposed street grade is an arbitrary interference with its private property. This should not be done under the guise of the exercise of police power.

In *City of Seattle v. Columbia & P. S. R. Co.,* 6 Wash. 379, the railroad was given the power of condemnation in

a public street, similar to that conferred upon railroads by the statutes of this state. The city of Seattle had authority to establish grades and regulate the laying of railways thereon, or to prohibit the same entirely. From the facts in that case it appeared that the railroad tracks had been destroyed by fire, and after such destruction the city undertook to raise the grade of the street. The court, in speaking of the power to improve and grade streets, said: "A city's power to improve and graduate its streets is undoubtedly a continuant power, not exhausted by its first exercise, and inalienable by the corporate authorities, and such authorities are the ones to judge of the expediency or necessity of its exercise. * * * That under this power the city's right to establish and execute a new and higher grade on Columbia street at the place in dispute follows as a matter of course must be taken with some degree of limitation." The court after saying that the raising of the grade would greatly impair the usefulness of the tracks, and thereby destroy the franchise and make it impossible for the railroad company to perform certain duties imposed upon it, the opinion proceeds as follows: "Under such a state of facts, we think the well-settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested. It cannot be exercised to the extent of working a destruction of such a franchise previously granted. This would amount to an unauthorized taking of property; and none of the cases cited by appellant, in our opinion, support such contention, as none of them go to the extent of holding that the city may so alter and change the grades of its streets as to work a destruction of a valuable property under such circumstances, but the right to change the grades of streets is sustained upon the ground that the same may be done consistent with the preservation of rights previously acquired by others."

In *Houston & T. C. R. Co. v. City of Dallas,* 98 Tex. 396, 419, 70 L. R. A. 850, 863, the court sums up the question

as follows: "If it be true that there is to be no benefit to the public from the proposed change, or a benefit which is inconsiderable when compared with the detriment to be suffered by the respondent, who will say that it is just and reasonable to subject respondent to such expense and loss as is averred? * * * When it is found that a proposed action is to be fraught with such consequences as those averred in the answer, a public exigency correspondingly great and urgent should be required in its support."

It is said in the majority opinion that the city had no power, by contract or otherwise, to alienate its right of control over its streets. It must be remembered, however, that, when the plaintiff sought to enter the city of Lincoln with its railroad and construct its tracks therein, the statutes of this state gave the plaintiff the right to condemn its right of way through the streets of the city in case no agreement in relation thereto could be made with the city council. Recognizing this fact, the council entered into an agreement with the plaintiff by which it was authorized to construct its tracks along Y street, and while the city could not, by contract or otherwise, wholly abandon its right to the control of its public street, still it had the power to contract with relation to the reasonable use thereof, and, having entered into such a contract, it should be required to abide by its terms, unless there has been a change of conditions such as requires it to abrogate the contract and resume the exercise of its power of control over the street in question.

As I view the record, no such public necessity has been shown, and it not appearing that the district court erred in its findings and decree, but on the contrary it appearing by the findings set forth in the majority opinion, and by the undisputed evidence, that the judgment of the district court was right, I am of opinion it should be affirmed.

KEARNEY WATER & ELECTRIC POWERS COMPANY, APPELLEE, v. ALFALFA IRRIGATION DISTRICT ET AL., APPELLANTS.*

FILED OCTOBER 30, 1914. No. 18,355.

1. **Waters: IRRIGATION: APPROPRIATION.** Prior to the irrigation statute of 1889 (laws 1889, ch. 68), our law provided no method of making a claim of appropriation of water except the construction of works in which to divert the water and diverting the same or applying it to a beneficial use, and the appropriator was not required to otherwise declare the amount of his claim until his right was challenged.

2. ———: APPROPRIATION. After the act of 1889 an appropriator whose right was established by the completion of his works for appropriation, and who desired to increase the amount of his appropriation, must proceed under that act. The amount of his prior appropriation was limited to the capacity of his works as completed when the act of 1889 took effect and diverting and applying the water within a reasonable time.

3. ———: ———: PRIORITIES: ESTOPPEL. Subsequent appropriators, and all persons claiming under them, were bound to take notice of the rights of prior appropriators which accrued before the act of 1889. If subsequent appropriators proceeded to construct their works for the diversion and use of water, prior appropriators might assume that such works were intended to be subject to their prior appropriation, and they would not, by their silence while subsequent works were being constructed, be estopped to assert the priority of their appropriation.

4. ———: ———: ———. The act of 1895 (laws 1895, ch. 69) required the state board to proceed and determine all appropriations of water recorded under prior acts, and the act of 1911 (laws 1911, ch. 153) extended that provision to all appropriations whether or not recorded. An appropriation under the act of 1877 (laws 1877, p. 168) which had not been determined by the board was not affected by adjudications of subsequent appropriations.

5. ———: ———: "REASONABLE TIME." Under the act of 1911, as amended in 1913 (Rev. St. 1913, sec. 3412), one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such landowners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right for a

*Opinion modified. See opinion, p. 119 post.

reasonable time to enable the landowners to apply it to all lands along the canal for which the water was originally appropriated. What is reasonable time will depend upon the conditions and circumstances of each particular case.

6. ———: ———: ———. This appropriation having been made under the law which permitted appropriations without actually applying it in any specified time, the plaintiff should be regarded as having appropriated water, within the limits of the capacity of its works, for lands under its ditch to which the water was applied within a reasonable time.

7. ———: ———: NOTICE. Appropriations of the water of the state can only be made of water not previously appropriated; and when an appropriation of water has been legally made, and the law at the time fully complied with, subsequent appropriators must take notice thereof. It is not necessary that a prior appropriator should personally notify such subsequent appropriators of his prior rights.

8. ———: ———: VESTED RIGHTS. The act of 1877 (laws 1877, p. 168) made no distinction between the use of water for irrigation and its use for power purposes. Both were equally protected under the act of 1889. Appropriations for power which were completed under the act of 1877 became vested rights and could not be taken for any purpose without compensation.

9. ———: ———: ADJUDICATION. The provision of the act of 1911 (laws 1911, ch. 153, sec. 21) that "no permit to irrigate any land shall be allowed unless the owner or owners of such land shall give consent to the same in proper form" should be applied by the state board when adjudicating appropriations under prior acts; and in this case, begun soon after the act of 1911 took effect, the state board was right in allowing the applicant to obtain and file the consent of the owners of land under the ditch while the proceedings were pending before the board.

10. ———: ———: REGULATION. The use for which water is appropriated must be a reasonable use. The right to use the water so appropriated must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use without any benefit to any one. The state board will by regulations from time to time allow subsequent appropriators such use of the water as will not substantially deprive the prior appropriator of his beneficial use thereof.

11. ———: ———: ———. The determination by the state board of the amount and priority of an appropriator is without prejudice to such subsequent rules and regulations as will insure a proper use of the rights so determined.

12. ———: ———: APPEAL: EVIDENCE. The evidence is found to sustain the findings and decision of the state board.

APPEAL from the State Board of Irrigation. *Affirmed.*

C. C. Flansburg, Beach Coleman, A. W. Lane, G. J. Hunt, Morrow & Morrow, Hazlett & Jack, E. C. Hodder, E. A. Cook, J. G. Beeler and *Wilcox & Halligan,* for appellants.

John N. Dryden and *Warren Pratt, contra.*

SEDGWICK, J.

The irrigation act of 1895 (laws 1895, ch. 69, sec. 16) required "the state board at its first meeting to make proper arrangements for beginning the determination of the priorities of right to use the public waters of the state, which determination shall begin on streams most used for irrigation, and be continued as rapidly as practicable until all the claims for appropriation now on record shall have been adjudicated." It seems that the legislature of 1911 amended this section and reenacted the requirement so that the board should proceed with the determination of priorities of rights in the public waters of the state, whether of record or not. Laws 1911, ch. 153, sec. 15.

It does not appear that the rights of the plaintiff, Kearney Water & Electric Powers Company, had been adjudicated before the 27th day of December, 1911. There is attached to the record a paper purporting to be a notice to plaintiff to file its claim with the board for adjudication. It is dated September 19, 1911, but is not signed, nor has our attention been called to any evidence that it was served upon plaintiff. On the 27th day of December, 1911, the plaintiff filed with the state board its petition, alleging an appropriation of water from the North Platte river of more than 500 cubic feet per second, and asking that its priorities of right be determined, protected and enforced. The appropriators of water in that water division were notified, and a hearing had before the state board of irrigation, highways and drainage. The board found

that the plaintiff had appropriated 140 cubic feet per second for water-power purposes under a 55.5 feet head and 22 cubic feet for irrigation purposes, and "that the priority of the appropriation dates from the 1st day of September, 1886, on or before which date the works were completed and the appropriation perfected by reason of applying the water to beneficial use." None of the parties to the litigation was satisfied. Nearly all have taken appeals or cross-appeals to this court.

It is contended that the plaintiff is estopped to claim priority of appropriation because: (a) It did not comply with the act of 1889 by posting notice; (b) it never had its claim adjudicated under the act of 1895; (c) it has never asserted any right to the waters of these streams until it filed this claim; (d) these objectors have been continually operating their canals, and communities live and subsist by reason of irrigation, extending 250 miles along the North Platte and 100 miles along the South Platte; (e) the North Platte river runs sometimes as low as 50, 20 or 32 cubic feet, and all of this would be lost by absorption or evaporation before it could reach plaintiff's ditch. In such case this order would prevent defendants from using the water and no good would result to plaintiff. The brief of the Tri-State Land Company assigns error as follows: "(1) The board erred in granting any water for irrigation purposes, as no water rights have ever attached to any specific land, nor has any landowner consented thereto, nor any land, except 14 acres belonging to the state, been irrigated successively prior to the year 1902. (2) The proof shows that only 66 2/3 cubic feet per second were employed for power purposes prior to 1889, and the board erred in granting anything in excess of that amount for power purposes. (3) The board erred in granting any water for power, with a priority superior to that of irrigation-users higher up the river."

In 1877 a statute was enacted giving corporations organized "for the purpose of constructing and operating canals for irrigating, or water-power purposes, or both," the right of eminent domain. The act declared such

canals "to be works of internal improvement." Laws 1877, p. 168. In 1889 a statute was enacted entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes, and to repeal (the act of 1877)." Laws 1889, ch. 68. This act provided: "A person, company or corporation desiring to appropriate water must post a notice in writing in a conspicuous place at the point of the intended diversion." Article I, sec. 8. A failure to comply with this and other requirements "deprives the claimant of the right to the use of the water as against a subsequent claimant who complies herewith except as provided in the next section." Article I, sec. 12. Sections 13 and 14, art. I, are: "(13) All ditches, canals and other works heretofore made, constructed or provided by means of which the waters of any stream have been diverted and applied to any beneficial use must be taken to have secured the right to the waters claimed to the extent of the quantity which said works are capable of conducting and not exceeding the quantity claimed without regard to or compliance with the requirements of this chapter. (14) Persons who have heretofore claimed the right to water and who have not constructed works in which to divert it, and who have not diverted it nor applied it to some useful purpose, must, after this title takes effect, and within ninety (days) thereafter, proceed as in this title provided, or their right ceases." Section 11, art. II, provides: "Nothing in this chapter contained must be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this chapter." Under these provisions of the act of 1889 one who had before that time "claimed the right to water," and had "constructed works in which to divert it," and had diverted and applied it to some useful purpose, was given the right of an appropriator. The act provided no other means of determining and fixing the extent and limitations of those rights. The policy of the act was to encourage the construction of works in which to divert water for irrigation and power

purposes. The capacity of the works constructed would afford evidence of the amount of the appropriation.

As the statute prior to the act of 1889 prescribed no method of making a claim of appropriation except the construction of the "works in which to divert" the water and diverting it or applying it to some beneficial use, the appropriator was not required to do more until his right was challenged. If he then claimed the amount which the works which he had constructed were capable of diverting to a beneficial use, and which he had diverted or so applied, his appropriation of that amount of water was complete. It does not appear that the plaintiff's rights were challenged until these proceedings were begun before the state board. The amount of plaintiff's appropriation then was the amount which the works which it had constructed before the act of 1889 were capable of so diverting, and which it had diverted or applied. If the plaintiff desired to increase its appropriation after the act of 1889, it would be required to comply with that act. It does not appear that the plaintiff ever made any appropriation under the act of 1889. The amount of its appropriation is therefore limited to the time when that act took effect. But, as to that amount, its right was already fixed, and it was not necessary to take any action under the act of 1889. The construction of its works and diversion and application of the water was all the notice of rights which the act of 1877 required, and was a sufficient assertion of its rights until those rights were challenged.

In *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, it is said in the first paragraph of the syllabus that, before the act of 1911, "one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such landowners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right until all lands along the canal for which the water was originally appropriated use the same; provided, formerly, that the water be applied to the land

within a reasonable time, and, now, within the time limited by statute." The rule that it must be applied within a reasonable time is principally for the benefit of the landowners and to prevent fraudulent appropriations of water. It would often happen, as in this case, that such lands could not be watered from any other source. In some cases the circumstances and conditions may require a longer time to apply the water to all the land for which it is appropriated, and in other cases a shorter time would be reasonably sufficient. This appropriation having been made under the law which permitted appropriations without actually applying it in any specified time, and this proceeding having been begun within a few months after the act of 1911 took effect, the plaintiff should be regarded as having appropriated water, within the limits of the capacity of its works, for lands under its ditch to which the water can be applied and was applied within a reasonable time. These defendants, and all persons contracting with them, were bound to take notice of the appropriation of the plaintiff so far as it had been perfected under the act of 1877. Those rights were expressly preserved by the act of 1889, and any one interfering with them did so at his peril.

The objection that plaintiff saw defendants constructing ditches, etc., and did not notify them of its claim was raised and disposed of in *McCook Irrigation & Water Power Co. v. Crews,* 70 Neb. 115. The court say: "As heretofore indicated, the inference is warranted that the defendants were seeking to obtain a right to the use of the water as appropriators under the law as then existing, subject, of course, to the plaintiff's prior right. This of itself, we think, disposes of the question of estoppel."

There is no merit in the objection that plaintiff never had its claim adjudicated. Under the statute of 1895 any appropriator might have his claim adjudicated by the state board. In such a proceeding all appropriators in the same water division should be made parties. No appropriator who has neglected to have his claim adjudicated, or has

failed to make other appropriators in the same water division parties thereto, can obtain any rights as against other appropriators whose rights have not been so adjudicated. The act of 1889 (laws 1889, ch. 68, art. I, sec. 7) provides: "As between the appropriators the one first in time is first in right." This, of course, would apply to all appropriators at that time either under that act or the prior statute. Those who appropriated water from the same source of supply, after the plaintiff had perfected its appropriation, did so knowing that the appropriator first in time is first in right. And those who contracted with such subsequent appropriators, either individuals, corporations or communities, could take no prior right.

The act of 1877 made no distinction between the use of water for irrigation and its use for power purposes. An appropriation for power purposes was regarded as favorably as for irrigation purposes. It was made in the same way, and an appropriation under that act for power purposes was recognized and protected by the act of 1889 equally with appropriations for irrigation. Our present statute declares that water for irrigation is "a natural want" (Rev. St. 1913, sec. 3369); and that, "when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes." Rev. St. 1913, sec. 3372. It is not necessary to determine in this case how these provisions of the statute are to be applied by the state board when conflicting applications for appropriation are pending. In any view, it must follow that vested rights of completed appropriations cannot be destroyed without compensation, and no condemnation proceedings have been attempted in this case. The state board in this case was not called upon to grant water for power. Its duty was to determine the validity and extent of an alleged completed appropriation. Under the present statute appropriations may be abandoned, and

the plaintiff's appropriation for power purposes should be regarded as abandoned, except so far as it had equipped itself to utilize it for that purpose when the act of 1889 took effect, or did so equip itself within a reasonable time thereafter. Its appropriation for irrigation purposes should be considered as abandoned, except so far as it was completed by the water being applied to the land in a reasonable time.

The act of 1911 provides: "No permit to irrigate any land shall be allowed unless the owner or owners of such land shall give consent to the same in proper form, duly acknowledged before some officer legally qualified to take acknowledgments." Laws 1911, ch. 153, sec. 21. It would seem that this provision is as effective when adjudicating prior appropriations as upon applications to appropriate. The plaintiff, while this proceeding was pending before the state board, procured the consent of certain landowners whose lands, it is claimed, can be watered from plaintiff's ditch, and it was the duty of the board to allow and confirm plaintiff's valid appropriation of water for the lands of owners so consenting. Before the act of 1895 water could be appropriated without applying it to any specified land; that is, one could appropriate water for irrigation, and afterwards "may use the same to irrigate such lands, as he may see fit." *Farmers Canal Co. v. Frank,* 72 Neb. 136. Since the act of 1895, in order to appropriate water for irrigation, the land to which it is to be applied must be specified. *Idem.* Frank's application was filed in 1902 and described no land. For this reason, the judgment of the district court, allowing his application, was reversed, but the district court was directed to remand his application to the state board with leave to amend. The state board correctly gave plaintiff opportunity to procure the consent of the owners of lands under the plaintiff's irrigation ditch as it was completed when the act of 1889 took effect, and confirmed its appropriation for the irrigation of the lands whose owners so consented, as well as its appropriation for power purposes.

The irrigation works of some of the defendants are located hundreds of miles above the intake of the plaintiff's canal. It is said that frequently during the summer months the river is dry at the plaintiff's intake, and to allow the water to pass the works of these defendants which could never reach the plaintiff's ditch would, in such case, be a vain thing. It would render thousands of acres of valuable irrigated land entirely barren and useless and without any benefit to the plaintiff. The question so presented is worthy of the most careful consideration of the state board. The use for which water is appropriated must be a reasonable use. The supreme court of the United States in *Basey v. Gallagher,* 20 Wall. (U. S.) 670, say: "Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." There is no doubt that this principle applies under our statute, and that it is the duty of the state board to prevent a wanton waste of the public waters of the state. This is a matter of administration. The board has determined the amount and priority of the plaintiff's appropriation. When nature supplies the water to satisfy such appropriation it must not be taken by subsequent appropriators to the injury of plaintiff. The state board should by regulations from time to time allow subsequent appropriators such use of the water as will not injure the plaintiff. The board should exercise a reasonable discretion. It is the policy of the state to preserve the public waters for the greatest benefit of all the people. A prior appropriator has the prior right to a reasonable use of the water so appropriated. But the plaintiff obtains that

right from the public for the use of the people, and must so use it as not to unreasonably injure the rights of another. Subsequent appropriators should not be refused the use of their appropriations unless such use substantially deprives the prior appropriator of his beneficial use thereof.

Such questions are not included in the findings and decision of the state board as contained in this record. As we have already observed, the board, as disclosed by this record, has only determined the amount and date of the appropriation of the applicant. The evidence upon the questions determined by the board is not as clear as might be desired. This court upon appeal cannot disturb the findings of the state board upon conflicting evidence unless it is clearly wrong. The statute allowing this direct appeal expressly declares: "The procedure to obtain such reversal, modification or vacation of any such decision or order upon which a hearing has been had before said board, shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district court to the supreme court of Nebraska." Rev. St. 1913, sec. 3408. The plaintiff was a pioneer in attempting to develop the irrigation and water powers of the state. It, and those through whom it claims, had expended hundreds of thousands of dollars before these objectors entered the field. This, of course, will not excuse plaintiff for any failure to comply with the law. But the evidence is not so clear as to require us to interfere with this determination of the matter. The decision of the state board is therefore affirmed without prejudice to an application to the state board by any party for such further regulations as may be necessary to secure a just and reasonable use of the rights determined by this decision.

AFFIRMED.

LETTON, J., dissenting in part.

With the general principles stated in the opinion, I concur. My objection to the opinion is that it does not consider the evidence, but assumes that the state board decided the matter upon conflicting evidence, and that therefore

its decision should not be disturbed. What the board evidently did was to confirm the claims of the Kearney company to the amount of water which the evidence shows it was using at the time of the hearing. As I read the record, the evidence does not conflict in regard to the essential facts: That the construction of the canal was begun in 1882 and the first two miles were completed that year; that the first 12 miles were completed by September 1, 1883, and the canal entirely finished in or before June, 1886; that from 1886 until 1890 no more than 66 2/3 cubic feet per second was actually used for power purposes, and at no time until very recently more than 5 cubic feet per second for irrigation purposes in any one year. In the meantime the Minatare, Mutual, Winters Creek, Enterprise, Mitchell, Castle Rock, Tri-State, Belmont, and Logan Canal Companies and Irrigation Districts made approriations and diverted water to a beneficial use from the North Platte river many miles above the intake of the Kearney canal. In 1890 additional turbine wheels were placed in the Kearney canal for the development of power which, with these first installed, required 140 cubic feet of water per second.

The evidence shows, however, that the use of this increased power had been long contemplated before the actual installation of the latter wheels, and that the purpose to use the water necessary to develop the power from both sets of wheels had never been abandoned.

Soon after the completion of the canal, and continuously for a number of years thereafter, a fourteen-acre tract of land belonging to the State Industrial School was irrigated. There is no proof that more than 160 acres of land were irrigated during any one year until about 1900, when for five years about 350 acres in all were irrigated. From that time on water was sparingly used, until shortly before the hearing. The canal company had a reasonable time after the completion of the ditch wherein to use the water for irrigation. For 20 years that company failed to apply in any one year more than about 5 cubic feet per second to a beneficial use for irrigation purposes, and most

of the time a much smaller quantity. The most vital principle in the law of irrigation is that all appropriated water must be made to perform its full duty, and that no one shall fail to apply it and at the same time prevent those who seek and are ready to use it from applying it to a beneficial use. Having failed to apply more than this quantity of water to the land for such a length of time, the right to the use of water in excess of that amount for irrigation purposes ceased.

Applying the principles stated in the opinion to the undisputed facts, the appropriation for irrigation purposes should not have been confirmed for more than 5 cubic feet of water per second of time. The excess appropriation is of water enough to irrigate nearly 1,200 acres of land, and its effect may be to reduce the amount of cultivatable land under the appropriations of the appellants to that extent. The works of the appellants water an arid region as compared with that in which the Kearney canal is situated, and, if any doubt exists, it should be resolved in their favor. I, therefore, dissent from that portion of the opinion which allows such excess appropriation.

BARNES, J., joins in the dissent.

JOHN JONES, ALIAS WILLIAM STANSER, V. STATE OF NEBRASKA.

FILED OCTOBER 30, 1914. No. 18,638.

1. **Criminal Law**: CONFESSIONS: ADMISSIBILITY. In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made.
2. ———: INVOLUNTARY CONFESSION: ADMISSIBILITY. An involuntary statement or confession is not competent against the defendant for any purpose.
3. ———: ORDER OF PROOF: ADMISSIONS. Evidence that defendant has admited guilt or important facts should not be received for im-

peachment or rebuttal, but should, if material and competent, be offered in chief.

4. Witnesses: CROSS-EXAMINATION: IMPEACHMENT. A defendant cannot be cross-examined, and afterwards contradicted in respect to matters that are not admissible as part of the case.

5. ———: ———: INVOLUNTARY CONFESSION. If the defendant has signed an involuntary written confession, it is erroneous to allow him to be cross-examined, for the purpose of impeachment as to the contents of that confession.

6. *Taylor v. State*, 37 Neb. 788, disapproved.

ERROR to the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Reversed.*

Carroll H. Wright, Will N. Johnson and *John A. McKenzie,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant, who is the plaintiff in error here, was found guilty of murder in the first degree in the district court for Douglas county, and his sentence was death. The case appears to have been carefully tried, but there are two serious questions presented by the record.

1. The evidence shows that, when the defendant was arrested for the crime, he was taken to the county jail and there in the presence of three officers he signed a written confession or statement. After the defendant had testified in his own behalf, he was questioned by the attorney for the state in regard to statements he was supposed to have made at that time to these officers, which statements were supposed to be inconsistent with his testimony in his own behalf, and, having denied that he made such statements, the officers were examined in rebuttal, and testified to certain admissions or statements made to them by the defendant. There was no proof that the alleged statements were voluntary on the part of the defendant. Counsel for the defendant insist that this amounted to proof of an alleged confession by the defendant while he was in cus-

tody on the charge of murder in the first degree, and that to receive such evidence was erroneous and prejudicial. It is contended by the state that the evidence tended only to prove an admission of a material fact inconsistent with the evidence of the defendant, and that, the proper foundation for impeaching testimony having been laid, the evidence of the officers was competent. The evidence that had been offered by the state in chief tended to prove that the defendant shot and killed the deceased in the pool hall, which was kept by the deceased, that the defendant had been playing a game of pool with certain parties, and that after the game a dispute arose between the defendant and the deceased in regard to paying for the game, and after a few words had passed between them the defendant left the hall, and in a few minutes thereafter returned, and, standing in the door by which he entered, asked the deceased to return the money which he had paid, and, being refused, he immediately shot and killed the deceased. The defendant admitted that he shot and killed the deceased, but insisted that it was during a quarrel and was in self-defense. After the defendant had testified to circumstances tending to support the defense, the following appears in the record:

"Q. Now, Mr. Jones, do you remember after you were arrested and brought back to the city of Omaha and taken to the city jail that you had a conversation in the presence of Stephen Maloney, W. T. Devereese, and Thomas Ring, with reference to this shooting? A. Conversation, no, I didn't have a conversation. Q. You had a talk with them? A. No, sir. Q. You had no talk with them at all? A. No, sir. Q. Do you remember signing anything at that time? A. Yes, sir. Q. In the presence of Steve Maloney, Thomas Ring and W. T. Devereese? A. Yes, sir. Q. And was that statement in your handwriting? A. No, sir. Q. It was read over to you, was it not? A. Yes, sir. Q. Do you remember stating to the officers at that time—

"Mr. McKenzie (defendant's attorney): I object to that as immaterial, irrelevant, and incompetent, and not the

proper way to examine a witness in reference to the contents of a statement he has signed.

"The Court: The form of your question is not proper. If you are laying foundation for impeachment you ought to ask him if he did not make a certain statement. To which ruling the state excepts.

"Q. Did you not at that time make this statement, with reference to the manner in which the shooting occurred at the pool hall at 1004 Capitol Avenue on the night of the 18th of October, 1913, did you not make this statement with reference to that: 'I stepped outside the door and asked again for my money, and he would not give it to me, and I went down to my room, 922 Capitol Avenue, and got my pistol from Mrs. Callia, and came back to Sam's pool hall; then I asked him for my hat and money, and he gave me my hat, but kept the money, and told me to go out as quick as I could.' Did you make that statement?

"Mr. McKenzie: I object to that as immaterial and irrelevant and incompetent, and not the proper way to examine a witness with reference to a statement which he is presumed to have made. Objection overruled. The defendant excepts.

"Q. Did you make that statement on December 11, 1913?

"The Court: I do not understand you are calling for the contents of a written instrument now, are you?

"Mr. Piatti (prosecuting attorney): Yes; he made that statement, and it was placed in writing and he signed it afterwards.

"The Court: I do not think that is right.

"Mr. Piatti: I am asking first if he made the statement to the officer.

"The Court: That is a different thing.

"A. No, sir.

"The Court: With the understanding you are not calling for the contents of a written document, but simply for a part of a conversation that occurred, I will permit the witness to answer.

"Mr. McKenzie: I understand counsel is reading from a statement.

"Mr. Piatti: That is simply to refresh my memory with reference to the statement.

"The Court: He can formulate the question to suit himself. The defendant excepts.

"Q. Did you make that statement in the presence of these officers on that date? A. No, sir. Q. In the city jail, city of Omaha? A. No, sir.

"The Court: Let us see what the state of the record is. (Record read by reporter.)

"The Court: If you are going to follow this up by way of impeachment, they would be entitled to that statement on the examination of the officers."

The most important question of the case was as to the grade of the guilt. If the crime was done with deliberation and premeditation as well as malice, it would be murder in the first degree and would justify the extreme penalty of death by electrocution. If it was done in the excitement of a quarrel and without premeditation and deliberation, the penalty of death could not be imposed. If, after the dispute between the defendant and deceased, the defendant left the hall to procure a revolver, and, after having procured it, returned and without further controversy killed the deceased, the fact of deliberation and premeditation would be established. The question, therefore, propounded to the defendant was in regard to an alleged admission that the crime was murder in the first degree. These officers, while the defendant was in their custody and in the jail, had caused this admission to be reduced to writing and had induced the defendant to sign the same. This writing, it is conceded by all, was a confession of guilt, and, holding this confession in his hand to refresh his memory, as he stated, the prosecuting attorney repeated to the defendant a part of the substance thereof and asked him if he made such statement in the presence of these officers. There was no evidence that this was a voluntary confession. Indeed, it would be difficult to establish it as such under the circumstances. If it was

intended to use the statement or confession as evidence against the defendant, it should have been offered as evidence in chief, and a confession cannot be used as evidence, unless it is first shown that it was voluntarily made. If the confession was competent, the writing itself would be the best and only admissible evidence.

"The reason for the rule excluding involuntary confession is not based on the thought the truth thus obtained would not be acceptable, but because confessions thus obtained are unreliable. The rule is in the interest of safe and reliable evidence. * * * The essence of the rule is that when the confessions are made the conditions as to hope or fear are such as to make them unsafe as evidence." *State v. Novak,* 109 Ia. 717, 729.

Mr. Wigmore says: "The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported; but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence." 1 Wigmore, Evidence, sec. 822.

An involuntary confession of guilt is incompetent for any purpose. The reason of this rule of law is well stated by the supreme court of Wisconsin in these words: "When the defendant was asked if he made that confession, and denied it, the same witnesses who extorted the confession, and whose testimony was disallowed on that account, are allowed to testify to the confession, however wickedly or wrongly it was obtained, on the exceedingly narrow theory that it is not admitted *as a confession,* but merely to *contradict* the witness. The confession is allowed to go to

the jury, and have its effect in convicting the defendants, and override the ruling of the court that it was inadmissible as evidence against him, and for such a petty reason. The confession is just as objectionable as evidence, and as incompetent and hurtful, when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done *directly,* but it can be done *indirectly.* It cannot be used to convict, but it can be used to *contradict,* the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust. This evidence was inadmissible on the familiar ground that a witness cannot be cross-examined and contradicted in respect to matters not admissible in evidence as part of the case. Wharton, Criminal Evidence (10th ed.) sec. 484. That confession first went to the jury and produced its effect as evidence, before it was excluded by the court, and finally goes to the jury as competent evidence by way of contradicting the defendant. It seemed impossible to keep it out, however objectionable or incompetent it was as evidence against the accused." *Shephard v. State,* 88 Wis. 185.

The brief of the attorney general admits that a confession of guilt not shown to be voluntary is inadmissible in evidence, but contends that the statement proved was not a confession of guilt, but merely the admission of an important fact which tended, in connection with other evidence, to show the guilt of the accused. This contention is well answered in the brief of the defendant's attorney as follows: "The state admits that a confession was made, but seems to distinguish between the oral and written expression of it. There appears this statement in the brief of the state: 'He went further, as is shown by the cross-examination of the officers who wrote out a complete con-

fession of the crime; this confession was not introduced in evidence because it was not necessary in establishing the man's guilt.' If the writing was a confession, then surely the preliminary statement that was incorporated in that writing was also a confession. If any part of it was a confession, then the whole story would be, and it would all receive the same taint and all be subject to the same strict rules of proof. The mental attitude of the accused is the same throughout the entire story, whether the story is given orally or in writing, and all the statements are equally untrustworthy. Counsel for the state at the trial below seemed to have a similar attitude. They considered that this statement was part of a confession to the police officers and refrained from putting any part of this statement in evidence as direct testimony. They were acting under an erroneous assumption that a confession could be used indirectly for purposes of impeachment without any preliminary proof of its voluntary character."

In *Walrath v. State,* 8 Neb. 80, the law is said to be: "Any circumstance tending to establish the prisoner's guilt may be *proved,* although it was brought to light by an admission of the prisoner, inadmissible, *per se,* as having been obtained by improper influence."

This case is cited in *Taylor v. State,* 37 Neb. 788, as tending to justify the conclusion reached in the latter case, but, of course, this statement of the law had nothing to do with the proof of admissions or confessions as such, but only as to the proof of facts that may have been discovered because of such admissions, and that are capable of being proved by other and competent evidence. In *Taylor v. State, supra,* the sheriff testified that, while he had the defendant in custody, he told the defendant: "I thought if he had committed this murder and made a clean breast of it, and if there were others implicated, and if he would tell all about it and all he knew about it, that I did not think he would be hung." He then testified, among other things that the defendant said and did, that he, the defendant, "told him, Curtis, in my presence, that he delivered the gun to him at his gate after he had done the job;

that he started out and said to him, 'You started east with the gun from your gate.' " The words "had done the job" plainly related to the commission of the murder, and the court, in the opinion by Mr. Commissioner RAGAN, which seems to have been concurred in by the other commissioners of the court, said: "It is true that in the statement made by Taylor to Curtis the prisoner voluntarily admitted the killing of Woods with the gun; but this confession, if it should be called that, was not made to the sheriff." After the defendant had made several statements tending to implicate himself in the crime, which statements were made pursuant to the proposal of the sheriff to protect him against the death penalty, he, the defendant, while explaining facts to the sheriff which would show how the crime was committed, made the statement to Mr. Curtis, in the presence of the sheriff, which was plainly a confession that the defendant had committed the crime. If it was intended to decide that this evidence was competent because the statement was addressed to Curtis, instead of being addressed to the sheriff, we cannot approve of the decision nor follow it as a precedent.

In *McLain v. State,* 18 Neb. 154, the defendant was charged with larceny, and, when arrested, a part of the stolen property was found on his person. It appears from the opinion that the evidence objected to as proof of the confession was simply that the defendant gave the officers some information by means of which they found one of the stolen articles. The defendant had pawned a watch in Chicago, and, without telling the officers who had placed it there, he gave the officers "the name of the shop where it might be found." Of course, it was rightly held that the proof of this fact was not proof of a confession of guilt.

In *Burnett v. State,* 86 Neb. 11, it was held that certain statements made by the defendant did not amount to either confessions nor admissions of guilt, and it was held that they were improperly treated by the court in its instructions as admissions of guilt. The opinion, perhaps, does not make the distinction between "inculpatory statements"

and a confession or admission of guilt very clear and definite, but it is manifest that the statements of the defendant which were proved related only to facts which were not important of themselves but might help explain other circumstances involved in the case.

In the case at bar the prosecuting attorney held the written confession in his hand and read therefrom to the witness a very important part thereof, and asked the witness, "Did you make that statement?" When this was objected to, the court asked the prosecutor if he was "calling for the contents of a written instrument," and the prosecutor answered, "Yes; he made that statement, and it was placed in writing and he signed it afterwards." The court said that was not right, but said, "With the understanding you are not calling for the contents of a written document, but simply for a part of a conversation that occurred, I will permit the witness to answer." The defendant's counsel suggested that the prosecutor was "reading from a statement." The prosecutor admitted that he was, but said it was only to refresh his memory, and the court decided that "he can formulate the questions to suit himself." Counsel considered, and the court seems to have also, that the prosecutor could use any part of the confession he saw fit for impeaching the defendant as a witness, although the confession itself was incompetent as evidence. In this the court was clearly wrong. The evidence, aside from that erroneously admitted, is sufficient to sustain the conviction. In a case where the jury is not vested with the power to decide whether the punishment shall be death or life imprisonment, we would consider that the error was not prejudicial, but where it is impossible to determine the effect which this had in causing the jury to decide upon the extreme penalty of the law, rather than the lighter punishment, such an error must be rejected as prejudicial. Reversals for mere mistakes in trials which do not affect substantial rights are not favored, but where the balance sways between life and death every such right of the accused must be protected.

2. The court instructed the jury: "Malice is that state or condition of mind indicated by a wicked and malicious purpose which characterizes the perpetration of a wrongful act intentionally committed, and without lawful excuse or justification. It is that quality or frame of mind which prompts the unlawful act. This frame or condition of mind is denominated express or actual malice, and its existence, if it does exist, is to be inferred or found by the jury as any other material element in the case,—beyond a reasonable doubt." In reading this instruction the punctuation suggests that the words "beyond a reasonable doubt" limit "inferred" as well as "found by the jury," so that the two expressions are equal, and "inferred" is merely iteration, that is, has no real force or meaning in the sentence. If the comma were placed after the word inferred, and the subsequent comma and dash omitted, it might be understood to mean that malice could either be inferred or found as a fact by the jury, and that in the latter case it must be proved beyond a reasonable doubt. It is dangerous to give the jury instructions, the meaning of which may depend upon the position of a comma. When the instruction is read to the jury they might be given a wrong impression by emphasis and pause at the word inferred. As that word is capable of a wrong construction and meaning as used in this sentence, and adds nothing to the meaning if rightly understood, its use in this instruction was erroneous. As the judgment must be reversed for the reasons first discussed, it is not necessary to consider whether, in the light of the whole evidence, and the other instructions given, the error in this instruction was without prejudice to the defendant.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

BARNES and FAWCETT, JJ., dissent.

ROSE, J., not sitting.

D. S. GILES & SON, APPELLEE, V. WILLIAM HORNER, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,674.

1. **Fraud:** ACTIONABLE FRAUD. Ordinarily, where a vendee has an opportunity for the inspection of personal property, representations by the vendor as to the value of the same are regarded as mere expressions of opinion, and afford no basis for an action of fraud and deceit; but where such representations are based on special knowledge of the vendor, which he obtained or pretended to have obtained by invoicing the property, and are believed by the vendee, and acted upon by him to his injury, they amount to actionable fraud. *McKibbin v. Day*, 71 Neb. 280.

2. **Trial:** INSTRUCTIONS: PREPONDERANCE OF EVIDENCE. Where the plaintiffs sued the defendant for damages, and the court instructed the jury as to the amount of proof necessary to establish fraud: "You are instructed that, where a party alleges fraud or fraudulent representations in an action or trade, he must produce a stronger proof than would be sufficient to establish a mere debt. Every party is presumed to act and deal honestly, and it is incumbent on him who alleges such fraud or dishonesty to furnish proof sufficient to overcome the presumptions of honesty," *held*, that the instruction is erroneous because it requires more than a preponderance of the evidence to establish fraud.

3. **Fraud:** INSTRUCTIONS. Where the defendant set up fraudulent representations upon the part of the plaintiffs, who were seeking to recover damages in an action for an alleged breach of contract, and the court instructed the jury: "You are instructed that, if you find from the evidence that the defendant in this action had an opportunity to examine the stock of hardware, and that the was well acquainted with the same, having been in and about said stock every day and a number of times during the day, and that it was so located as to be convenient for him to observe the same, and that he could easily have ascertained the value of said stock, then and in that case you are instructed that it would not constitute any fraudulent representations in behalf of the plaintiff, if he had made statements relative to the value of said stock, and under such circumstances it will be your duty to find for the plaintiff and against the defendant," *held*, that the instruction was misleading and prejudicial, because it took from the jury the consideration of whether the plaintiffs represented to the defendant that they had made an invoice of the stock of hard-

ware, and by such representations induced the defendant to trade properties with the plaintiffs, when otherwise he might not have done so.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

Wilcox & Halligan and *J. G. Mothersead,* for appellant.

J. W. James, contra.

HAMER, J.

The defendant, William Horner, appeals from a judgment of the district court for Lincoln county rendered against him and in favor of the plaintiffs, D. S. Giles & Son, in the sum of $625.44. The defendant in his brief alleges that the plaintiffs, who were partners, agreed in writing with the defendant to transfer to the defendant their stock of hardware at Wallace, Nebraska, in exchange for nine head of horses and colts, a piano, and a saddle and bridle, all to be furnished by the defendant and delivered to the plaintiffs, and, in addition, the defendant agreed with the plaintiffs to pay $660, bills against the business of the plaintiffs for goods sold and delivered to them. The defendant took possession of the stock of hardware, but he refused to take up the bills against the business, and claims that when the plaintiffs made the agreement with him they fraudulently represented the stock of hardware to be of greater value than it actually was; that the defendant and his wife, after the defendant got possession, took an invoice of the stock of goods and found it to inventory only $1,180; that Giles, in the presence and hearing of Horner, stated that he had inventoried the stock of goods the night before the trade was made, and that it inventoried about $2,200, not including some wire and other things in the implement shed; and that if these things were counted the inventory would amount to about $2,300. The plaintiffs deny making any representations concerning the amount and value of the goods in the store, but say that the night before the trade was made an *estimate*

was made of what the stock on hand was. After the defendant, Horner, took possession of the store and found, as he claims, that the goods inventoried less than he understood their value to be, he refused to pay the outstanding bills against the business, and he so notified the plaintiffs. There was a bill of $200 for woven wire. There was some dispute about the bargain concerning the woven wire, but it is undisputed that the defendant paid for it. If the plaintiffs represented that the stock would inventory $2,300, it would leave the defendant damaged in the sum of $1,120, less a remainder of $460 yet to be paid on the bills against the defendant, after taking out the item of $200 paid for the woven wire. In the answer of the defendant it is alleged that the plaintiffs had just taken an inventory of the stock and that they knew that the inventory then taken amounted to $1,300, and no more, and that, when the plaintiffs made their representations to the defendant that the stock was of the value of $2,300, they knew said representations were false, and that the inventory only amounted to $1,300; that the defendant believed the representations of the plaintiffs that the stock of goods was of the value of over $2,200, and, relying upon the truth of said representations, signed the agreement, which he otherwise would not have done. In the reply the plaintiffs deny that they represented the stock of goods to be of the value of $2,300, deny that they ever stated that they would guarantee the stock to be of the value of $2,300, and deny that they ever represented that an inventory of the stock had been taken. It is further alleged in the reply that the plaintiffs were about the store every business day during many months, and knew the condition of the stock, and knew its value, and that the plaintiffs were also familiar with the trade.

The first error alleged is the giving of instruction No. 9, which is as follows: "You are instructed that, where a party alleges fraud or fraudulent representations in an action or trade, *he must produce stronger proof than would be sufficient to establish a mere debt.* Every party is presumed to act and deal honestly, and it is incumbent on him

who alleges such fraud or dishonesty to furnish proof sufficient to overcome the presumptions of honesty." It is contended by defendant that "fraud is but one of the elements of a civil action, and as such it is established by a preponderance of the evidence."

In *Patrick v. Leach,* 8 Neb. 530, the court was requested to instruct the jury that they "will not be justified in finding that Patrick was guilty of fraud, unless the evidence on that subject shall satisfy their minds thoroughly. Evidence which might satisfy them in any ordinary action of debt is not sufficient. But the evidence which produces in the minds of the jury a clear, distinct, and positive conviction, in which they rest in confidence that they are right, will alone be sufficient to justify the jury in finding Patrick guilty of the alleged frauds." This instruction was refused and the plaintiff excepted. This court held that it was calculated to mislead, and that it was properly refused. This court said: "But the degree of proof required in an action for damages is merely a clear preponderance of the testimony establishing the fraud."

In *Kline v. Baker,* 106 Mass. 61, the syllabus states the point as follows: "In an action in which the plaintiff sought to rescind a sale on the ground that it was induced by the defendant's fraudulent representations, the defendant requested the judge to rule that stronger proof was required to prove the representations false than to prove an ordinary agreement. The judge declined to do so, and ruled that the rule of evidence was the same as in other civil cases; that fraud was not to be presumed, but fairly found on the evidence; and that the burden was on the plaintiff to prove his case by the fair preponderance of testimony. *Held,* That the defendant had no ground of exception."

"Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him." *Davidson v. Crosby,* 49 Neb. 60.

"Where fraudulent representations are relied on as a defense to an action, the same must be proved by a clear

preponderance of the evidence." *Ish v. Finlay*, 34 Neb. 419.

"Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced upon him." *Clark & French v. Tennant*, 5 Neb. 549, citing *Howe v. Howe*, 99 Mass. 89.

In *Tootle & Maule v. Dunn*, 6 Neb. 93, it is said in the syllabus: "Fraud is never presumed, but must be proved, and the degree of proof necessary to establish it is the same in equity as at law."

In *Hough v. Dickinson*, 58 Mich. 89, it is said in the body of the opinion: "In the twenty-third request, as stated in the record, and which was given by the court, the jury was told: 'The proof of fraud should be so clear and conclusive as to leave no rational doubt of its existence.' Such is not the rule in civil cases. It applies only in criminal proceedings. Fraud, like any other fact, may be proved by any facts or circumstances which satisfy the mind by a preponderance of the evidence in any given case of its existence, and many times it is inferred, and properly so, from circumstances, and often cannot be proved in any other way. *O'Donnell v. Segar*, 25 Mich. 367. Mr. Justice Campbell, in discussing this question in *Watkins v. Wallace*, 19 Mich. 57, where the language used by the court was, 'The proof must be clear and conclusive,' says: 'No such rigid rule prevails in any such civil case. Common sense teaches every one to be cautious in arriving at conclusions which are prejudicial to character and honesty, but if the testimony produces a rational belief, a civil jury cannot be required to discard it because it is not conclusively established.' In these views I fully concur. The charge was erroneous, and it is difficult to say the jury were not misled by it."

In *Watkins v. Wallace*, 19 Mich. 57, it is said in the syllabus: "It is error for a court to charge a jury, so as to mislead them into the belief that more stringent proof was necessary than the law requires. In civil cases a jury cannot be required to discard testimony which produces a

rational belief, because it does not conclusively establish the fact to be proved."

In *Turner v. Younker,* 41 N. W. 10 (76 Ia. 258), the third point in the syllabus reads: "It is erroneous to charge that fraud may be proved by showing circumstances from which the inference of fraud is natural and irresistible, as it is only necessary that the circumstances should lead naturally and fairly to the conclusion sought to be established." In the body of the opinion it is said: "On the issue of fraud the court gave the following instruction: 'The burden of proving fraud is upon the party alleging it. Fraud is not to be presumed without proof. Yet fraud, like any other fact, may be proved by proving circumstances from which the inference of fraud is natural and irresistible; and if such circumstances are proved, and they are of such a character as to produce in the mind of the jury a conviction of the fact of fraud, then it must be considered that fraud is proved.' The doctrine of this instruction is that the circumstances relied on to establish that the transaction was fraudulent must lead irresistibly to that conclusion, or they are not sufficient. We think it is erroneous. * * * In civil actions the parties are required to establish their allegations by a preponderance of testimony only."

In *Foley v. Holtry,* 43 Neb. 133, this court held: "The elements necessary to sustain such an action (to rescind) have been recently summarized by this court as follows: (1) It must be alleged and proved what representation was made; (2) that it was false; (3) plaintiff believed the representation to be true; (4) relied on and acted upon it; (5) and was thereby injured."

The instruction concerning fraud requires too high a degree of proof, and is therefore prejudicial to the defendant, because it probably led the jury to reach the verdict rendered.

Instruction No. 10, given at the plaintiffs' request, reads as follows: "You are instructed that, if you find from the evidence that the defendant in this action had an opportunity to examine the stock of hardware, and that he

was well acquainted with the same, having been in and about said stock every day and a number of times during the day, and that it was so located as to be convenient for him to observe the same, and that he could easily have ascertained the value of said stock, then and in that case you are instructed that it would not constitute any fraudulent representations in behalf of the plaintiff, if he had made statements relative to the value of the said stock, and under such statements relative to the value of said stock, and under such circumstances it will be your duty to find for the plaintiff and against the defendant."

Where both parties have an equal opportunity of ascertaining the value of the goods, any opinion concerning the worth of the property expressed by the vendor may not be objectionable; but if the information as to the value of the goods is information peculiarly within the knowledge of the vendor, and to ascertain the value of the goods it would require a special examination on the part of the vendee, then the vendee, as a matter of law, has a right to rely upon the representations of the vendor. The objection to the above instruction is that it overlooks the plaintiffs' statement concerning the making of the inventory.

The defendant testified that he sometimes saw the stock of hardware every day, but that he would average once a week, and then again he might not be in for two weeks; that he did not know what stock the plaintiffs had there. There is apparently nothing in the evidence to justify the court in giving the instruction above given. The defendant could not know anything concerning the goods shown by an inventory. Before he could know what goods were in the store, the defendant would have to make an independent investigation on his own account; that is, he would have to make an inventory. He had a right to rely upon the peculiar and exclusive knowledge of the plaintiffs.

The defendant testified that the plaintiffs took an inventory in the evening before the trade was made. He remembered that they went through the stock; that it was in the evening; that they took the inventory after

dark; that there were three Spencers there, and a Mr. Stevens, who used to clerk for the Spencers in the lumber yard; and that Stevens kept one book while Giles was keeping the other. The plaintiff Giles denies that an inventory or invoice was made. He was asked the question whether anything was said about an invoice, and he answered, "No, sir." Although Mr. Giles denied that any invoice was taken, he testified: "We did not take any invoice; *we took an estimate.* Q. When was that taken? A. A night or two before I made the trade with Mr. Horner." It was for the jury to determine in the conflict of testimony between these witnesses. It was their province to find whether the defendant had a right to rely upon the plaintiffs' representations to the effect that he had taken an invoice. The above instruction seems to be objectionable. This instruction was no doubt prejudicial to the defendant under the evidence given. *Foley v. Holtry,* 43 Neb. 133; *Olcott v. Bolton,* 50 Neb. 779; *Perry v. Rogers,* 62 Neb. 898; *Berge v. Eager,* 85 Neb. 425; *McKibbin v. Day,* 71 Neb. 280. In the last named case the effect of possessing information touching the value of goods sold, and being peculiarly within the knowledge of one of the parties, and requiring a special examination on the part of the other party, is discussed, and the effect of such condition is considered and stated. The plaintiff in that case purchased certain land and a stock of hardware. The defendant represented the land to be of certain value, and said that he had invoiced the stock of hardware, and that it was of a certain value. The court instructed the jury that, where the parties had an equal chance of examining the goods, such representations were merely expressions of opinions, but on appeal to the supreme court the judgment of the lower court was reversed. The supreme court held that the representations did not apply with respect to the land, but that they did apply to the stock of hardware. It was held that the knowledge of the defendant as to the value of the stock of hardware was peculiarly within the knowledge of the seller and that to ascertain the truth or falsity of the statements made

would require an independent or special examination, and that the purchaser had a right to rely upon the statements and representations of the seller concerning the value of the stock of goods. It will be noticed that the instant case and the case cited have a close resemblance. In the instant case the defendant, Horner, would be required to make a special inventory of the goods in order to ascertain the truth of the plaintiffs' representations. When the court instructed the jury in effect that the defendant had no right to rely upon those representations, there was prejudicial error to the defendant.

The judgment of the district court is

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

PHILIP H. KOHL, APPELLEE, V. COLUMBUS R. MUNSON ET AL., APPELLANTS.

FILED OCTOBER 30, 1914. No. 17,804.

1. **Statute of Frauds:** PAROL EVIDENCE: JOINT UNDERTAKING. Where the plaintiff and two other men endeavored in association with each other to procure a purchaser for a certain tract of land at a price satisfactory to the seller, and he accepted their services, and each contributed time and labor to the common plan and assisted in its execution, in an action by the plaintiff against the other two to recover his share of the profits of the transaction, the relation of the parties may be established by parol, and the provisions of section 3, ch. 32, Comp. St. 1911, do not apply to such persons, or determine the relations between them. *Stewart v. Mather*, 32 Wis. 344.

2. **Appeal:** CONFLICTING EVIDENCE. In such case, where the parties failed with their first proposed customer to consummate a sale, but succeeded with their next one, and there is a conflict of testimony as to whether the plaintiff participated in making the sale to the second customer, it is for the jury to find the facts, and their verdict will not be disturbed if there is evidence to support it.

APPEAL from the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed.*

I. J. Dunn, for appellants.

A. R. Davis and *F. S. Berry, contra.*

HAMER, J.

There was a verdict for the plaintiff for $1,000, and judgment thereon against all the defendants. The defendant Munson appeals. The plaintiff, Philip H. Kohl, alleged in his amended petition, filed in the district court for Wayne county, that he was an experienced real estate man living at Wayne, Nebraska, in the year 1906; that he was acquainted with real estate values in Hand county, South Dakota, and with persons in that territory; that one Robert Fullerton owned a tract of 2,740 acres of land in that county; that at the request of the defendants he entered into an agreement with them, whereby they and he were to attempt to secure from said Fullerton authority to sell said land; and that in case of the sale thereof, or any part of it, the profits were to be divided between the plaintiff and defendants each to receive one third; that in case only a part of the land was sold, and it should be found necessary in order to consummate the sale, the plaintiff would take an equal share in the remainder of the land with each of said defendants; that the plaintiff and defendants secured authority from Fullerton to sell the land, Fullerton to receive $15 net an acre, and the plaintiff and defendants to have all over that amount; that Fullerton agreed to take back a mortgage on the land in case of a sale for $20,000, the same to be prorated over it in small tracts; that thereafter plaintiff and defendants sold two-thirds of the land to one Charles Shultheis for $18 an acre, whereby they made a profit of $5,480, which sum was paid to and received and retained by the defendants; that the defendants without any sufficient cause refused to pay one third of this sum, or any part of it, to the plaintiff; that the plaintiff performed his part of the agreement; and that it was not found necessary to take any interest in any part of the

land in order to consummate the sale to Shultheis; that two-thirds of the said land had been conveyed to said Shultheis by said Fullerton, the owner, and by warranty deed which had been recorded. A demurrer to the said amended petition was interposed by the defendants and was overruled.

The defendants then answered, setting up: (1) A general denial; (2) that the contract set up was void under the statutes of Nebraska and South Dakota, and in contravention of the statute of frauds of each of said states; that no contract in writing was ever made or executed by either the plaintiff or the defendants between themselves, or between themselves and the owner of the land in controversy. Sections 1311 and 1770 of the civil code of South Dakota are pleaded. The following facts are also stated in said answer: That Munson obtained Fullerton's price for said land, being $15 an acre net; that Fullerton then agreed with Munson that he could have all he could make above that sum; that Munson and the plaintiff talked about said land and the price therefor, and agreed orally to try and interest one Henry Kellogg and R. Phileo of Wayne, Nebraska, in buying said tract jointly with them; that said Kohl agreed to buy a one-fourth interest for the purpose of inducing the said third party to engage in purchasing said land; that plaintiff and defendant Munson went to South Dakota, and there saw Fullerton and arranged with him to ask $18.50 an acre for the land in pricing it to the said parties, and the plaintiff and defendant Munson agreed that, if the land was sold, the difference between $15 and $18.50 an acre, $3.50, should be applied by them and by said Kellogg as a partial payment upon their several interests in said tract; that said Fullerton refused to enter into a written contract to sell an option on the land; that when Phileo and Kellogg looked over the land they refused to buy it; that all parties to this suit then stated to Fullerton that they would not buy the land; that thereupon Fullerton withdrew his offer to sell the land, and said that he would sell it to other parties who were then waiting to buy; that no other agreement or

arrangement was ever had concerning said land between plaintiff and defendants; that the plaintiff had nothing to do with the sale of the land to Shultheis, and did not offer to take any interest in the same, and it was not taken by Shultheis; that Shultheis did not offer to pay any share of the money necessary to buy the remaining one-third of the land, and that he did no act of performance whatever concerning the said sale; that about 30 days after the parties saw Fullerton, defendant Munson learned that said land had not been sold, and thereupon he showed said land to Mr. Shultheis, who bought one-half thereof; that defendants Munson and Kellogg bought the remaining one-half, and without Kohl's knowledge or cooperation; that the sum of $3 an acre received from Shultheis above the price to Fullerton was applied by defendants as a part payment upon said lands received by them. There was a reply, which is substantially a general denial, and alleges no new matter which is material.

On the trial it was objected by the defendant Munson that the petition failed to state a cause of action against him; also, that there was a misjoinder of causes of action, for that the plaintiff contended that he entered into a partnership contract with the defendants and was entitled to one-third of the commission, and that if the plaintiff had any cause of action it was against *each defendant* for his *individual share,* and not a joint cause of action against the two defendants, and that Munson should pay no part of Kellogg's share. Kellogg made the same sort of objection. Both objections were overruled.

When the plaintiff rested, the defendants each moved for an instructed verdict, because (1) the contract between Munson, Kellogg and Kohl was that each should acquire an undivided interest in the land if they should sell or secure the sale of less than the title interest to a third person; that the sale to Shultheis and Kellogg was for a title consideration of $50,000, $41,325 being the net price which it was agreed should be paid to Fullerton; that under the contract Kellogg did purchase from Fullerton one-half or one-third of the land, and took in his

own name a deed for an undivided one-third interest; (2) no commission payable in cash resulted from the transaction, even under the testimony of the plaintiff; that neither Munson nor Kellogg was financially indebted to the plaintiff, and the only right of either was an interest in the land or in that portion of it which was deeded to Kellogg; (3) that the contract was an oral contract for the acquisition of an interest in the land, and void under the statute of frauds, and not enforceable under the laws of Nebraska or South Dakota. Each motion was overruled.

The plaintiff testified to living in Wayne about 21 years; that his occupation was real estate and loans, in which he had been engaged about 12 years; that he was acquainted with the defendants, Columbus R. Munson and Henry Kellogg, having known them about 20 years; that Munson was engaged in what is known as "curbstone real estate;" that Kellogg was a retired farmer and also a dealer in real estate; that the plaintiff had had dealings with them in real estate prior to the present transaction; that in September, 1906, the plaintiff had talked with the defendants with reference to a tract of land in South Dakota; that his first conversation was with Kellogg alone, and about three months later he talked with Kellogg and Munson together; that Kellogg informed him that C. R. Munson, through one L. C. Tredway of Huron, had located a tract of land in the western part of Hand county, South Dakota, some 2,740 acres; that this land was owned by Robert Fullerton; that it could be bought for $15 an acre, and that a good sized mortgage could be "carried back" on the land; that Kellogg at that time had in view Mr. Phileo, to whom they expected to sell a one-half interest at $17 an acre, and that they wanted to know of the plaintiff, Kohl, if he would go in with them and help them to carry the other half interest. Kohl testified that he figured the matter over, and then said he would not go into the deal unless he could raise the price of the land to $18.50 an acre; that they could afford to go into it then if that was done; that they talked the matter over, and finally all agreed that they would try to get the price of

the land raised to $18.50 an acre; that the outcome of the whole talk was that they were to carry a half interest together, or whatever interest it was necessary to carry, provided they could make a sale; Kohl testified that after they agreed to go in on this deal at $18.50 an acre Kellogg said he would go and get Mr. Munson. Munson testified that Kellogg said to him what he thought of the deal and how to handle it. Kohl testified that he told Munson the only way would be to raise the price of the land; that after the talk Munson was just as willing as Kellogg, and that they agreed to go to Wessington in advance of Mr. Phileo and *get the price of the land raised,* which was done. The plaintiff testified that it was agreed to divide the profits so each would receive a third, and that Kellogg said, "You had better go, Phil; take time; you understand these things a little better than Munson does; you can go along and explain matters, and Munson will be there as a witness;" that they then went to Wessington, and out to the Fullerton ranch, where they took dinner with Fullerton, and Fullerton agreed to raise the price of the land to $18.50 an acre, and also agreed that the land should be taken with a $20,000 mortgage against it, the same to be proportioned off on the different quarter sections or half sections. After this Kohl and Munson had certain negotiations concerning the details of the transaction, all the parties participating. All the parties testifying agreed that Tredway was to have $500, and Fullerton understood this arrangement. Fullerton testified that when Munson came to his ranch with the plaintiff he "introduced him as a partner of his interested in this deal, and they came out to see it." The evidence was conflicting. The jury found in favor of the plaintiff, and there is sufficient evidence to sustain the verdict. It must be considered, therefore, that the allegations of the petition have been established as the true facts in the case. It is therefore unnecessary to detail the evidence at length.

It is contended by the defendants that this case is ruled by *Norton v. Brink,* 75 Neb. 575. We have carefully read the entire bill of exceptions, and there is a substantial dif-

ference between the cases. In the *Norton* case there was a rehearing. The first opinion, *Norton v. Brink,* 75 Neb. 566, held that, when an agreement for the purchase and sale of land is fully performed, an action may be maintained against the person holding the title to compel an accounting for the profits realized. On the rehearing it was held that a parol agreement between two persons to purchase a single tract of land together or "in partnership," where the purchase is finally made by one of them, and he pays the whole of the purchase price and takes the title to himself, the other simply agreeing to pay him one-half thereof on demand, does *not* create a partnership between such persons. The evidence in that case shows Mrs. Norton was ready to furnish her share of the purchase price, but was never allowed to pay it, and the sole heir of the purchaser sold the land and refused to account to the plaintiff, Mrs. Norton, for her alleged share of the profits. C. D. Brink purchased the land through Warren Pratt. Pratt dealt with C. D. Brink alone, and Mrs. Norton had no part in the negotiations for the property, and she was not mentioned in connection with the deal. C. D. Brink paid for the land out of his own funds by a check and obtained a deed from the owner. C. D. Brink died seized of the land, and the defendant Jay H. Brink, who was his sole heir at law, subsequently sold the land for $6,400, less the commission. There was no memorandum between C. D. Brink and Mrs. Norton concerning any joint interest in the land or the purchase of it. There was no settlement between Mrs. Norton and C. D. Brink, and he did not refuse to carry out the contract according to the oral agreement, because he died without making any demand for the payment of one-half of the purchase money by Mrs. Norton, and before she had reimbursed him, and before any settlement between them. An action was brought by Mrs. Norton against Jay H. Brink, sole heir of the deceased. She was defeated in the district court for Buffalo county, and on appeal the judgment of the district court was reversed; but on a rehearing it was affirmed and the former judgment of this court was overruled. In the

instant case the plaintiff, Kohl, actively participated in the transaction. The first thing to do was to get an agreement of some kind out of Fullerton, so that the three parties operating together could handle the land. Kohl went along to see Fullerton. The first trip which Munson, Kohl, Kellogg and Phileo made resulted in Fullerton agreeing to such terms as would enable them to handle the land and make a profit out of it if they were successful. Fullerton testified that, when Munson and Kellogg came back to see him, he told Munson that the land could be sold the same as under the original agreement. This original agreement the plaintiff Kohl helped to get. It is not denied that the plaintiff went to see Fullerton, and that the plaintiff and Munson got Fullerton to agree that they might fix the price at $18.50 an acre so far as the purchaser was concerned. Fullerton was only to get $15 an acre for himself. The three of them, the plaintiff, Kohl, Munson and Kellogg, started out to get a purchaser for Fullerton's land. The three of them were all actively in it. The plaintiff Kohl assisted in procuring the consent of Fullerton to cut up the proposed $20,000 mortgage and to place a part of it on the land; each quarter was to carry such an amount as it would conveniently sustain. This made the deal possible. Otherwise it was not possible. The proposed purchaser of the land to be bought of Fullerton was any man with money enough to buy that the three of them could find and get into the deal. Munson testified as to what the arrangement was, $18 an acre, less 50 cents commission and 50 cents an acre commission that Tredway was to get. There is no dispute between the plaintiff, Kohl, and Munson and Fullerton that Tredway's name was on this paper. The plaintiff Kohl sold the interest in the land which Kellogg got to Kellogg himself. Kohl testified that he agreed with Kellogg to take half of Kellogg's interest, and that Kellogg made a settlement with him concerning the half before the deed was executed. Kellogg did not testify, and therefore there was no testimony from him supporting Munson's evidence, that there was no

arrangement with the plaintiff, Kohl, about the division of the profits. Kellogg paid the plaintiff for his interest in the land. Would Kellogg have been willing to pay the plaintiff anything if there was no agreement that the plaintiff should participate in the profits? The conduct of Kellogg seems to support Kohl's evidence. Munson remembered that he handed the memorandum to Fullerton. He does not appear to have known whether Fullerton signed it or not. He did not want Shultheis to know that there was any memorandum, and very naturally under the circumstances. There is a conflict in the evidence, yet enough evidence to sustain the verdict, and for this reason it ought not to be disturbed.

A careful examination of the case of *Norton v. Brink, supra,* seems to be required. It is said in the body of the opinion in that case that Mrs. Norton's contention is that the contract established a partnership between herself and the deceased, and therefore comes within the rule announced in *Dale v. Hamilton,* 5 Hare (Eng.) *369, *Richards v. Grinnell,* 63 Ia. 44, *Pennybacker v. Leary,* 65 Ia. 220, and other cases, which hold that a contract entered into for the purpose of speculating in lands is not within the statute of frauds, and need not be in writing; that where the parties have contracted to engage in the business of buying lands which are to be held in trust for both of them, and they are to have equal interests and shares in the common speculation, such agreement constitutes a partnership, and the action by one partner against the other for an accounting as to the partnership transactions may be sustained, although the partnership funds may be invested in lands. The appellant in *Norton v. Brink, supra,* did nothing upon her part. She contributed nothing. She did not receive anything.

Section 4, ch. 32, Comp. St. 1911, reads: "The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law." Section 4 contemplates the danger

of doing wrong under section 3, and endeavors to forbid and prevent the perpetration of such wrong. Section 3 reads: "No estate or interest in land, other than leases for a term not exceeding one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." Because of the existence of section 4 it is made clear that it is within the power of a court of equity to fasten a constructive trust upon property where it is obtained by commission of a fraud, actual or constructive. Section 4 expressly provides that section 3 shall not be construed to prevent any trust from arising or being extinguished by implication or operation of law. This provision includes resulting and constructive trusts which are not created by the express terms of a contract. An agent instructed to purchase property for his principal will not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself.

In *Pollard v. McKenney,* 69 Neb. 742, it was held, as stated in the syllabus: "Where a wife prevails upon her husband, who is fatally ill, to convey certain of his property to her by promising to make a certain disposition thereof among his heirs at law, it will be presumed from her wilful failure to make such disposition that her promise was made without any intention of performing it, and was therefore fraudulent." Another paragraph of the syllabus in the same case reads: "Where a person obtains the legal title to real estate belonging to another by means of fraud, actual or constructive, a court of equity will fasten a constructive trust upon the property, and convert the grantee or those claiming under him, by descent, into trustees of the legal title, and enforce the trust for the benefit of the grantor or those claiming under him." There was a rehearing in this case, and another opinion was delivered. The former opinion was adhered to, and the syl-

labus was further enlarged by adding to it: "A decree establishing a constructive trust should not be limited to a cancelation of the conveyance whereby the constructive trustee acquired title to the land; the trust should be ascertained and enforced."

We adhere to the views expressed in *Norton v. Brink, supra.* We do not consider that the evidence shows the establishment of a partnership, but does show that an arrangement was made by which certain stipulated profits were to be divided among the three persons who engaged in the transaction; that each contributed something, and that all solicited the making of the terms which enabled them to carry out the transaction; that all worked at the common purpose, and that all are rightfully entitled to the division contemplated.

The judgment of the district court appears to be right, and it is

AFFIRMED.

ARTHUR J. ROGERS V. STATE OF NEBRASKA.

FILED OCTOBER 30, 1914. No. 18,511.

Criminal Law: EVIDENCE: HEARSAY. Where the plaintiff in error, who was convicted upon the charge of obtaining money by false pretenses, obtained the money by means of a check given on a bank at El Paso, Texas, and the bank refused payment of the check, and sent a telegram to another bank characterizing the defendant as a fraud who had never had an account in the bank on which he had drawn his check, and requesting that the defendant should be apprehended, such telegram is not admissible in evidence. It will be regarded as a communication between third parties and as mere hearsay, made by one who speaks without the sanction of an oath and without opportunity for cross-examination.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

Sterling F. Mutz and *Harold M. Noble,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

HAMER, J.

The plaintiff in error, Arthur J. Rogers, was tried and convicted in the district court for Lancaster county. He was charged with the crime of obtaining money under false pretenses. There is evidence tending to show that he represented to the cashier of the First National Bank of Havelock, H. R. Frank, that he had money on deposit in the Union Bank & Trust Company of El Paso, Texas, subject to check and more than sufficient to pay his check for the sum of $50, being the check which he presented to the bank at Havelock, and on which that bank paid the money.

Several errors are assigned by plaintiff in error; but, as at least one of the assignments must be sustained, we will content ourselves with a consideration of that assignment. The evidence shows that after the check had been paid by the bank at Havelock, July 30, 1913, that bank sent the check to its correspondent, the Central National Bank of Lincoln, Nebraska, and that in due course of business it reached the Union Bank & Trust Company at El Paso, Texas, on or about August 7, 1913. Payment was refused. Upon the trial a telegram addressed to Central National Bank was identified by the agent of the telegraph company as having been received by its Lincoln office in due course of business, and by an officer of the bank to which it was addressed, and as having been received in the regular course of business by the bank. This telegram, over the objection of plaintiff in error that it was irrelevant, immaterial, and not the best evidence, was received in evidence. It was also objected by plaintiff in error that it was not shown that it was original, and that no sufficient foundation had been laid, and that it was hearsay. The body of the telegram offered in evidence reads: "El Paso, Texas, Aug. 7, 1913. Central National Bank, Lincoln, Neb. Items totaling seventy-five dollars signed Arthur J. Roger on us. Yours July thirtieth cleared today. Party bank fraud. Never an account here and un-

known to us and request you have apprehended and report at once American Bankers Association for action. Has been operating this game for the last six months. If we can assist you command us further. Union Bank & Trust Co."

The matter contained in the telegram was the statement of one not under oath and not attending the trial. Its introduction offered no opportunity to cross-examine touching the matters contained in it. The statement is clearly that of a person not before the court, and not subject to cross-examination, and it was a communication by one third party to another. In *Bedford v. State,* 36 Neb. 702, there was consideration of the same sort of question. The court say: "These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know. Letters of third persons are receivable in evidence as merely collateral, introductory, or incidental to or in illustration of the testimony which the witness gives. 1 Chitty, Criminal Law, *368, *369; 1 Phillips, Law of Evidence (4th Am. ed.) 170. As, where a witness testified that he was induced to institute proceedings by letters of a third party. *Lewis v. Manly,* 2 Yeates (Pa.) 200. But the letters could not be received as evidence of the facts stated in them. 5 Am. Law Register, 468. 'All acts, declarations, etc., made by third persons are obnoxious to two objections: (1) That they are *res inter alios acta,* and therefore irrelevant. (2) That they are mere hearsay, the assertions of parties without the sanction of an oath and opportunity for cross-examination.'" No case has been cited where a communication of this kind between third parties has been admitted. The telegram was highly prejudicial, and it was clearly error to admit it.

The bill of exceptions shows that special counsel appeared in the case to assist the county attorney. He examined the most important witnesses for the state, among others Mr. Moye, the secretary of the bank at El Paso. He also examined Mr. C. E. Sapp. When T. R. Sapp was

recalled he conducted his examination. He closed the argument to the jury. He was anything but mild in his manner and in his language, and was such a prosecutor as is not contemplated by the statute. Section 5599, Rev. St. 1913, provides that the county attorney may procure assistance in the trial of any person charged with the crime of felony. The statute contemplates that he shall be paid by the county board for his services. The theory of the statute is that an impartial prosecutor will be selected to assist the county attorney "under the direction of the district court." The purpose of the statute is to exclude counsel employed by private capital or procured by persons who seek their own self-interests, or who wish to gratify personal animosities. This method of selecting assistant counsel is not to be used as an engine of oppression. The employment of the prosecutor is not to be placed in the hands of wealth. The object of the statute was to put these interests out. The statute looks to the employment of an assistant who shall stand evenly balanced between the accused and the state. Special counsel seems to have been crisp in his temper and incisive in his speech. He resented the necessary interruptions of counsel, and his remarks are not free from the suggestion of personal violence.

In *McKay v. State,* 90 Neb. 63, the act in question was discussed. It is said in the opinion cited: "We are not unmindful of the fact that in many cases, particularly in sparsely settled counties, young lawyers of little experience are ofttimes, from necessity, elected to the office of county attorney, and, if the prosecution of felony cases were left to such a county attorney alone, crime might go unpunished. * * * It has not left it to outside parties to select the assistant counsel. It has imposed that duty upon the county attorney and district court, and has provided that the county attorney may, under the direction of the district court, procure such assistance. Counsel thus procured will not be actuated by sordid motives. * * * It is just as much the duty of a county attorney to see that an innocent man is not convicted as to see that the

guilty receive their just deserts. * * * Counsel called to assist in the prosecution should govern his actions in like manner."

When counsel are brought into the case to assist the county attorney, all the reasons that require fair treatment of the accused upon the part of the county attorney apply to his assistant. The judgment of the district court is reversed.

REVERSED AND REMANDED.

SEDGWICK, J., concurs in the conclusion.

ROSE, J., not sitting.

CHARLES BELANGEE V. STATE OF NEBRASKA.

FILED NOVEMBER 12, 1914. No. 18,424.

1. **Contempt: JURISDICTION: AFFIDAVIT.** "An affidavit alleging material facts on information and belief does not give a court jurisdiction of a contempt proceeding." *Freeman v. City of Huron*, 8 S. Dak. 435.
2. ———: ———: INFORMATION. "Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged contempt. The charge should be stated in a positive manner, and it is not sufficient for the affiant to allege that he 'is informed and believes' certain material facts." *Ludden v. State*, 31 Neb. 429.
3. ———: ———: AFFIDAVIT. "The statements must be as of the personal knowledge of the affiant. They may not be on information and belief." *Herdman v. State*, 54 Neb. 626.
4. ———: ———: ———. "The affidavit in such a proceeding is jurisdictional." *Herdman v. State*, 54 Neb. 626.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

Benjamin S. Baker, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

This is a proceeding in error to the district court for Douglas county in a case where plaintiff in error, who will hereafter be referred to as defendant, was found guilty of contempt of court in an attempt to corrupt a juror in a case on trial in said court. As shown by the transcript, the proceeding was inaugurated by the filing of an information by the county attorney charging the accused with the specific offense. The charge contained in the information constitutes a constructive criminal contempt; that is, that the act, consisting of an attempt to bribe a juror, was not committed in the presence or hearing of the court, nor near the court when and where it was in session. The information was filed without any previous proceedings. It is in the exact form of an information in a criminal prosecution, with the exception that at its close it is alleged that the acts committed were "contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska, *and in contempt of said district court and its dignity;*" a phrase not essential to the validity of a charge either in an ordinary criminal prosecution or a prosecution of this character. It is claimed that the verification of the information is not sufficient, for the reason it is not positively sworn to; the recital in the affidavit being that "the facts set forth in said information are true, to the best of my knowledge and belief." After the filing of the information, defendant raised the question of jurisdiction by proper motions, objections, and exceptions, all of which were overruled, when he entered his plea of not guilty, with a general denial of the allegations of the information. A trial was had to the district court resulting in finding defendant guilty as charged in the information. A motion for a new trial was filed and overruled, also a motion in arrest of judgment was filed, and which also was overruled, when defendant was sentenced to pay a fine of $500 and to be

imprisoned in the county jail for a period of six months and to pay the costs of prosecution. The case is now here for review; one of the contentions being that the court was without jurisdiction to hear the case or render any judgment.

Upon the question as to the verification of the information, it has been held in this state that the affidavit required in cases of contempt is jurisdictional. *Gandy v. State,* 13 Neb. 445; *Ludden v. State,* 31 Neb. 429; *Hawthorne v. State,* 45 Neb. 871; *Herdman v. State,* 54 Neb. 626. In this case the information, filed by the county attorney, must be taken as the affidavit upon which the jurisdiction depends. There were two other affidavits presented to the judge, which he delivered to the county attorney, as shown by the bill of exceptions, but they do not constitute any part of the basis of the prosecution. In fact, in so far as the information is concerned, they are ignored. The affidavit of verification was made by the county attorney. We know of no rule of law *requiring* the affidavit to be made by him, nor do we find any provision or decision making it his special duty so to do. The affidavit must be treated the same as if made by any private person. It is the settled law that "the affidavit must state positive knowledge; if on information and belief, it is insufficient." *Herdman v. State, supra,* citing *Ludden v. State, supra, Gandy v. State, supra; Freeman v. City of Huron,* 8 S. Dak. 435; *Thomas v. People,* 14 Colo. 254; 4 Ency. Pl. & Pr. 779, 780. As we have seen, the affidavit, or information, was not sworn to in the positive form. In other words, it did not state "positive knowledge" of the facts charged in the body of the information. To state that the facts are true to the best of one's "knowledge and belief" falls far short of the statement that the affiant knows them to be true, which is essential in a charge of contempt. This want of jurisdiction was urged from the beginning to the end of the proceeding. The law governing the verification of informations in criminal prosecutions is upon an entirely different basis. It is required that the charge be made by the prosecuting attorney, after a pre-

liminary examination in which the facts are established, often by a great number of witnesses testifying to separate and distinct facts consisting of circumstances, which would be impossible if personal knowledge by the prosecutor was required. In such cases the accused party is entitled to a jury trial, the jury, and not the court, deciding all questions of fact, but this is not true in contempt proceedings. The law seeks to protect the citizen from such prosecutions unless some one make the charge upon his personal knowledge, when the case is brought before the court, heard and decided by the court, not by a jury, and in a summary way disposed of. The law upon that subject, as declared by the courts, is reasonable—a necessary and just protection to the person charged. The statement in an affidavit of verification refers to the charges contained in the body of the affidavit, and by which they are modified to the same extent as if the same language accompanied each statement of fact. Under averments and affidavits of the kind before us, it would be difficult, if not impossible, to convict any one of perjury in making the affidavit and charge, however false they might be. The defense that the affiant believed the statement to be true according to the best of his knowledge would be an absolute defense in a prosecution for perjury. As said by Judge Maxwell in *Ludden v. State, supra*: The court is not informed "upon what grounds" the affiant "based his belief. His informant may have been a 'busy-body' who meddled in the affairs of others without knowledge or judgment, and his belief may have been based on the idle statements of those who knew nothing of the matter." It is very clear that the charge made against the defendant was not sufficient, and the objection to the jurisdiction should have been sustained.

The judgment of the district court is reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissents.

SEDGWICK, J., dissenting.

The opinion assumes that the evidence is sufficient, and disposes of the case on the insufficiency of the informa-

tion. The statute makes the acts charged a crime that may be punished by indictment or preliminary examination and information and jury trial, or as a contempt of court. Section 8238, Rev. St. 1913, provides that punishment for contempt shall not be a bar to indictment and trial by jury.

In this case there was no indictment nor preliminary examination. The information states the facts constituting the contempt of court, and then says: "In contempt of the said district court and its dignity," it is a proceeding for contempt. It contains some allegations that would be necessary in an indictment, and probably some other surplusage, but this would, of course, not invalidate the information, if otherwise sufficient. The allegations of the information are positive, but the verification by the county attorney is upon belief. The opinion holds it void because of the form of the verification. The question naturally arises: How can a prosecution for contempt in such case be instituted? It will rarely, perhaps never, happen that any one person will of his own knowledge know all the facts necessary to constitute the offense. It would seem that the statute which provides that "the party, upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense" (Rev. St. 1913, sec. 8237), does not contemplate any very formal proceeding. This statute seems to be all that there is in the statutes in regard to information or proceeding for constructive contempts. It may be that this court in some earlier cases has gone too far in adding formalities. The cases cited in the opinion, *Ludden v. State,* 31 Neb. 429 (violation of an injunction), the prosecution was to enforce property rights, and neither the affidavits nor evidence showed that the defendant had anything to do with violating the injunction; *Herdman v. State,* 54 Neb. 626 (injunction); *Gandy v. State,* 13 Neb. 445 (attempt to bribe witness); and *Hawthorne v. State,* 45 Neb. 871—all hold that the information must state the facts positively; that is, the "accusation" against the defendant, of which he must be notified and have time to

make defense (section 8237), must be in direct and unequivocal terms, and not guesswork. None of them holds that it must be positively verified, and in one of them (*Gandy v. State*) it would seem there was no verification at all, but that fact is not discussed.

If knowledge of an attempt to bribe jurors comes to the court, it may, and should, direct the prosecuting attorney to investigate, and, if sufficient evidence is found, prosecute. The county attorney cannot make the verification under this decision, and there is no provision to compel witnesses who knew the facts to make complaint. It would seem, then, that proceedings for contempt in such cases are done away with by the opinion. There remains the slow and doubtful prosecution by indictment or preliminary examination, but this leaves the court helpless for the time being. He might adjourn the term until a grand jury or examining magistrate could act. When a prosecution for constructive contempt is instituted for the purpose of enforcing a property right, or some similar purpose, the facts ought to be plainly and directly stated so that the court may know that the prosecution is in good faith. Perhaps, in such case the court might require that the statement of facts be positively verified, though this court has never so held. But when the contempt is a public crime, and the court requires the public prosecutor to formulate the "accusation" against the defendant so that he can be notified thereof when he is "brought before the court," as the statute requires, and the prosecutor makes the information stating all the facts plainly and fully, there is no statute requiring such information to be positively verified. The majority opinion seems to me to introduce an unnecessary technicality not imposed by the statute.

LETTON, J., concurs in this dissent.

ALBERT W. JOHNSTON ET AL., APPELLANTS, V. WILLIAM FRANK ET AL., APPELLEES.

FILED NOVEMBER 12, 1914. No. 17,833.

1. **Executors and Administrators:** SETTING ASIDE ADMINISTRATOR'S DEED: FRAUD: BURDEN OF PROOF. In an action to set aside an administrator's deed for fraud and conspiracy, the burden of proof is on the plaintiff to establish the alleged fraud and conspiracy by a preponderance of the evidence.
2. ———: SALE OF LAND: CLAIMS. The land, which is not the family homestead of an intestate, may be sold by the administrator when necessary to pay the debts of the decedent; and a claim by his widow for money advanced by her in paying a portion of such debts may be properly allowed as a claim against his estate.
3. **Homestead:** SUIT TO SET ASIDE ADMINISTRATOR'S DEED: SUFFICIENCY OF EVIDENCE. The testimony examined, and found sufficient to establish the fact that the land in question was not the homestead of the decedent at the time of his death.
4. **Executors and Administrators:** APPOINTMENT: VALIDITY: BURDEN OF PROOF: PRESUMPTIONS. Where the plaintiff alleges that the appointment of the widow as administratrix of the estate of her deceased husband was void because her appointment was not made at the time fixed by the published notice, it is incumbent upon the plaintiff to establish that fact by a preponderance of the evidence. The county court being a court of record, there is a presumption in favor of the regularity of its proceedings; and the introduction of only a part of the proceedings in evidence will not rebut the presumption of regularity.
5. ———: SUIT TO SET ASIDE ADMINISTRATOR'S DEED: SUFFICIENCY OF EVIDENCE. Where it appears from the evidence that the administratrix filed a petition in the district court of the county where the land was situated; that notice of the hearing of the application was duly served on all persons interested in the estate; that on the hearing of the application the license was granted, and was filed with the clerk of the court; that the administratrix thereafter filed the bond and the oath required by law in such cases, and after giving proper notice sold the land at public sale for its full value, for the purpose of paying the debts of her deceased husband; that the sale was examined and confirmed, and a deed made to the purchaser under the order of the court; that the license was recorded in the complete record; all of the proceedings

being regular, the deed of the administratrix will not be declared void.

6. **Dicta Disapproved.** The dicta in *Stack v. Royce*, 34 Neb. 833, and *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, pointed out in the opinion, disapproved.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

Williams & Williams and *Hoagland & Hoagland,* for appellants.

G. J. Hunt, F. A. Wright and *J. G. Mothersead, contra.*

BARNES, J.

Action by the heirs of William Johnston, deceased, to set aside an administrator's deed and quiet their alleged title to a part of the west half of the southwest quarter of section 26, township 21 north, of range 52 west of the 6 P. M., situated in Morrill county, Nebraska.

Plaintiffs' petition set out the title of William Johnston to the land, his death, and their heirship. The petition further set forth the probate proceedings and administrator's sale of the land in question to the defendant William Frank, and the conveyance by him to his codefendant, the Tri-State Land Company. The petition specifically pointed out the objections which plaintiffs contend render void the title acquired by Frank. They are, in substance, as follows: First. That the land was the family homestead of William Johnston at the time of his death, and therefore exempt from sale for the payment of his debts. Second. It charged fraud and conspiracy by the defendants to defraud the plaintiffs of their title. Third. The petition set forth certain defects in the notice of application for letters of administration, and alleged that the hearing was not had on the day set. Fourth. It was alleged that there were no debts against the estate of William Johnston, deceased. Finally, it was alleged that the license to sell was void because of an alleged failure to serve a copy of the notice to show cause on the infant heirs.

Defendants in their answer admitted that the title to the premises was formerly in William Johnston. The relationship of the plaintiffs to William Johnston, and the appointment of the administratrix, the procuring of the license to sell, the administratrix's sale, and the conveyance of the land by Frank to the Tri-State Land Company were also admitted. Defendants denied that the land was the family homestead of William Johnston, deceased, and denied all allegations as to fraud and irregularities in the probate proceedings and the sale of the land by the administratrix. The trial resulted in a judgment for the defendants. From this judgment the plaintiffs have appealed.

The evidence discloses that William Johnston died intestate some time in the year 1904; that at the time of his death he was running a hotel in Bayard, Nebraska, and had left the land in question some five years before his death. It also appears that he was indebted to several persons, including bills for lumber, money due a building and loan association, grocery bills, meat bills, and other debts, some of which his widow, Anna C. Johnston, had paid by money advanced by herself. Mrs. Johnston testified that she was desirous of paying these debts, and she therefore concluded to sell the land to William Frank, who was at that time purchasing large amounts of land in that vicinity. Frank testified as follows: "I stated that I would purchase the land, and we (meaning himself and Mrs. Johnston) agreed upon the price. But on looking up the record I told her that it would be necessary that the land be sold at judicial sale and asked her if there was any reason for a judicial sale, and she said that there were debts to be paid, and they had to sell something to pay them; and I explained, and we agreed, that it would have to go through a judicial sale and be sold, the estate to pay all the costs, and that I would bid $400 for the land at that sale. This agreement was carried out, and the land was purchased by me for $400." It appears from the evidence that Mrs. Johnston, after her talk with Frank, proceeded to have the estate of her deceased husband pro-

bated. She employed L. L. Raymond of Scottsbluff, Nebraska, to act as her attorney. Mr. Raymond was neither the attorney for the Tri-State Land Company nor for Mr. Frank. There was no attorney at Bayard, and Mr. Frank asked Mrs. Johnston who she desired to act for her, and suggested that she might employ Mr. Raymond. She thereupon employed him. It appears that proper probate proceedings were had, and claims were filed against the estate, among others was one for Mrs. Johnston for the bills which she had paid that the estate owed. It is suggested in appellants' brief that if she paid any bills it must have been with money belonging to the estate. There is no evidence to support this statement, and Mrs. Johnston herself testified that the bills were paid with money she earned in the hotel. The amount of the claims which were allowed against the estate were something like $700. License to sell the land was granted. The sale was duly advertised, and at the sale the land was purchased by William Frank for $400. The testimony of both William Frank and the witness Raymond was that Mr. Raymond, at the request of the administratrix, cried the sale in her presence. It is contended, however, that fraud was shown because the widow did not understand the proceedings, and that there was a fraudulent conspiracy between Frank and Raymond to secure title to the land. These claims are conclusively rebutted, not only by the testimony of Mr. Raymond that she understood the proceedings, but also by letters which she wrote him showing clearly that she understood all the proceedings and cheerfully signed such papers as were presented to her, and understood the whole transaction. It appears that she went alone to Sidney, the county seat, and transacted a large part of the business herself. The testimony shows beyond question that she desired to have the land sold for the purpose of paying the debts of her deceased husband. It also appears that the land, at the time it was sold, brought its full value, to wit, $400. The plaintiffs introduced no evidence to contradict this testimony, but assert in their brief that the value must be too

low, because in that vicinity lands later sold for $35 an acre. It is also stated in appellants' brief that the $400 was paid to Mrs. Johnston at the time she gave a quit-claim deed, and that nothing was paid at the administratrix's sale. The record is void of any evidence that would justify this assertion. The testimony shows that Mr. Frank was engaged in purchasing thousands of acres of land in the vicinity of Bayard, and it is unreasonable to suppose that he would pay his money for the land without investigating the title. Mrs. Johnston testified that the money was left in the bank at Bayard, Nebraska, and it is reasonable to suppose that it was left there to be paid over if Frank bid the $400, as was expected.

It is further contended by appellants that fraud was established, because Frank agreed to bid $400 at the administratrix's sale. If this was a fact many of the judicial sales in the state of Nebraska are fraudulent. It is often the practice of parties interested to get some person to agree to bid a certain amount before they offer lands at a public sale. In the case of *Norman v. Olney*, 64 Mich. 553, the validity of an administrator's sale was in question. It was urged that, because the purchaser agreed to bid $40 an acre, and the land was sold to him, the sale was fraudulent. The court disposed of this contention as follows: "There was absolutely no evidence tending to show that Born and the defendant were not purchasers in good faith. On the contrary, they paid for the land all that it was considered to be worth, and the only thing urged against the *bona fides* of the transaction on their part is the fact that they agreed to bid $40 an acre if the executor would obtain license from the court to sell it. The sale, however, was properly noticed according to law, and such agreements to bid are often secured before sale by executors and others at judicial sales. Such an agreement could not and did not interfere with others bidding higher if they so desired."

As we view the evidence, plaintiffs failed to establish any of the allegations of fraud.

It is further contended that the land was the homestead of William Johnston, deceased, and therefore could not be sold for the payment of his debts. The testimony shows beyond question that Johnston and his family had removed from the land, and had been living in the hotel at Bayard some five years prior to his death; at that time he was running the hotel, and had never decided to change his occupation. His family lived in the hotel with him. The part of the land occupied by Johnston and his family when they lived on it was not the west half sold by the administratrix to the defendant William Frank. After Johnston left the land and moved to the hotel he sold the part of the land on which was situated the house and improvements to a third party, and it was owned by such third party at the time of his death. It is true that Mrs. Johnston afterwards repurchased it. The testimony clearly shows that the land in question herein was not the family homestead of William Johnston at the time of his death.

The appellants also challenge the validity of the appointment of Mrs. Johnston as administratrix of the estate of her deceased husband, for the alleged reason that her appointment was not made at the time fixed by the published notice. It appears, and the plaintiffs alleged in their petition, that letters of administration were issued to Mrs. Johnston by the probate court of Cheyenne county, and that fact was admitted by the defendants. It further appears that her petition was filed in the county court on the 20th day of May, 1904; that a hearing on the petition was ordered by the county judge, the date of the hearing being fixed on the 16th day of June; that notice thereof was published in the Bayard Transcript, a weekly newspaper published in the county, for four successive weeks prior to the day of the hearing. It is evident that the hearing was continued; that service was had upon the minor heirs; and that Mrs. Johnston was appointed administratrix of the estate of her deceased husband. The testimony shows that the proceedings were recorded in Book No. 2 of the records of the county court, on pages 247-254, and pages 604-605. Of these records plaintiffs produced in evidence

only the order to show cause, service thereof, and the affidavit of the publisher of the Bayard Transcript that the order was duly published for four consecutive weeks prior to the hearing. It must be observed that the county court is a court of record; that all presumptions will be indulged as to the regularity of its proceedings, and, in the absence of proof to the contrary, such presumptions are conclusive. It follows that the plaintiffs failed to show that Mrs. Johnston's appointment was void.

The bill of exceptions shows that all of the proceedings in the district court for a license to sell the land in question at administratrix's sale were regular. But it is contended that the sale was void because the license was not recorded in the journal of that court prior to the day on which the land was sold. This fact, however, does not clearly appear from the evidence.

Section 1451, Rev. St. 1913, provides: "In all cases where the judge shall order a sale of any real estate, while sitting at chambers, he shall make out in writing a copy of such order, and cause the same to be filed in the office of the clerk, who shall thereupon record such order, before any sale shall be made as aforesaid."

It appears from the evidence that the judge of the district court made out the order, which was filed by the clerk long before the sale was made, and the complete record, which the defendants introduced in evidence, shows that the order was recorded, but it was not shown when it was recorded in such record. In the absence of any evidence to the contrary, it may be presumed, however, to have been recorded before the sale.

In *Stack v. Royce,* 34 Neb. 833, the question here presented was discussed, and, while the language of the court as contained in the opinion indicates that the filing and recording of the order was jurisdictional, still the syllabus of the case, which is supposed to cover all of the points decided, reads as follows: "Such petition and the license must be filed in the office of the clerk of the district court of the county in which administration was granted."

The question was again considered in *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, where, after a lengthy discussion, it was held: "An order or license, to an administrator to sell real estate of an intestate, granted by a judge sitting at chambers, must be filed in the office of the clerk of the district court of the county in which letters of administration are issued, before the administrator is empowered and authorized to sell such real estate."

The exact question here presented was not involved in either of these cases, and it must be observed that the provision in the statute, "who shall thereupon record such order," seems to relate alone to a duty imposed upon the clerk of the court, and not to what the administrator is required to do. It must be further observed, however, that the administratrix in this case filed the order with the clerk of the district court in ample time, and we are not willing to hold, where the evidence is uncertain as to whether the order was in fact entered on the record by the clerk before sale, it is sufficient to render the sale void. It may be conceded that the clerk ought to have recorded the order, but it is equally true that the administratrix complied with all of the requirements of the law, so far as she was concerned, and it is not believed that the failure of the clerk to perform his duty in the premises will require the court to set aside an administrator's deed, and we hereby disapprove of the dicta found in the opinions in the cases above mentioned, which would seem to establish a different rule.

It clearly appears from the evidence that the license was issued to the administratrix; that due notice of the sale was published in the Bayard Transcript a sufficient length of time; that all of the heirs of the decedent acknowledged service of the notice by personally signing their names thereto; that the administratrix gave the bond required by law, which was duly approved by the court; that she took the oath which she was required to take in such cases; that the sale was properly conducted, and the land was sold to the purchaser, who paid the administratrix therefor the

sum of $400, which was the full value of the land at that time.

It further appears that the court examined all of the proceedings; that the sale was confirmed, and a deed was made by the administratrix to the purchaser under the order of the court. The complete record contains all of the proceedings, including the license granted the administratrix to sell the land for the payment of the debts of the deceased, and it may be presumed, in the absence of positive evidence to the contrary, that it was recorded in proper time.

As we view the record, the plaintiff failed to establish such a state of facts as would require us to set aside the deed made by the administratrix to the purchaser. The judgment of the district court is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED NOVEMBER 12, 1914. No. 17,848.

1. **Railroads:** USE OF STREETS: INJUNCTION. Where a railroad company, acting under the terms of an ordinance which was adopted as an inducement to the company to build its line to and through a city, constructed its tracks in a street of the city in compliance with all of the terms of the ordinance, it will be protected against the threatened action of the city to unnecessarily, unreasonably, and oppressively move its tracks.
2. ———: FORECLOSURE OF MORTGAGE: SALE: RIGHTS OF PURCHASER. A master commissioner's deed, executed under a decree in a foreclosure suit, will convey to the purchasing company the rights acquired by the company in whose favor the original ordinance was adopted.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed, and decree entered.*

Edson Rich, A. G. Ellick and *B. W. Scandrett,* for appellant.

F. C. Foster and *D. H. McClenahan, contra.*

BARNES, J.

Action by the Union Pacific Railroad Company, in the district court for Lancaster county, to enjoin the city of Lincoln from compelling the plaintiff to move its west extension track on Fourth street 35 feet east of its present location opposite block 135 in said city, and to prevent the officers of the city from interfering with the plaintiff in its maintenance and use of said track. The trial in the district court resulted in a judgment refusing the prayer of plaintiff's petition and a dismissal of the action. The plaintiff has appealed.

It appears from the bill of exceptions that in the year 1879 the city of Lincoln, by an ordinance duly passed and approved, granted to the Omaha & Republican Valley Railroad Company the right to occupy Fourth street in said city (which is 100 feet wide) from R street south to the city limits, by its railroad tracks, in consideration of certain improvements to be made by said company for the benefit of the city and the traveling public. It appears that the railroad company accepted the city ordinance according to its terms, and as soon as possible constructed its tracks on Fourth street, located and constructed its depot, freight houses and other improvements mentioned in the ordinance, and within a short time fully complied with all of its provisions; that said company constructed its line of railroad into and through the city from north to south on said street, and it and its successor, the Union Pacific Railroad Company, have ever since operated said line of railroad as was contemplated by the terms of said ordinance; that in 1881 another ordinance was passed and approved by the city, granting said first named company additional rights and privileges on the east half of Fourth street, but the ordinance of 1881 in no manner repealed the original ordinance of 1879, and in no way interfered with

the terms of said first named ordinance. It also appears that on the 4th day of October, 1898, all of the rights, immunities and privileges granted to the Omaha & Republican Valley Railroad Company were, by a special master commissioner's deed, conveyed to the plaintiff, the Union Pacific Railroad Company; that said company has filed its articles of incorporation in the office of the secretary of state of the state of Nebraska, and has thus become domesticated, and is entitled to all of the rights, privileges and immunities of such a corporation; that the plaintiff is operating the railroad, constructed and used since the year 1881 by its predecessor, the Omaha & Republican Valley Railroad Company.

The record discloses that on the 28th day of November, 1904, the city council of the defendant city passed and approved the following ordinance:

"Whereas, the Union Pacific Railroad Company maintains a spur track within the sidewalk space along the east line of block one hundred and thirty-five of the original plat of the city of Lincoln; and whereas, by reason of the location of said spur track, Fourth street, between H and J streets, is unnecessarily closed to travel; therefore, be it ordained by the mayor and council of the city of Lincoln, Nebraska:

"Section 1. That the said Union Pacific Railroad be and is hereby instructed and required to remove said spur track and all other tracks owned or controlled by it on said described part of Fourth street to a distance of not less than thirty-five feet east of said block one hundred and thirty-five (135) within thirty days after the passage, approval and publication of this ordinance.

"Section 2. That the city engineer is hereby instructed and required to remove said spur track in default of compliance with the provisions of this ordinance on the part of the said Union Pacific Railroad Company.

"Section 3. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

"Section 4. This ordinance shall take effect immediately upon its passage, approval and publication."

To prevent the enforcement of this ordinance the plaintiff brought this action. It is contended that the ordinance is unreasonable, unjust and arbitrary upon its face; that there was no public necessity for its passage, and its enforcement would serve no general public interest, but would destroy the plaintiff's power to properly serve its patrons and the public. It appears from the evidence that the plaintiff's main line of railroad runs along the center of Fourth street from R. street south to the city limit; that commencing at about the middle of the blocks between K and J streets, and running thence south to about the middle of the blocks between G and F streets, are located the extensions or side-tracks of the railroad company. The west extension track runs along blocks 135 and 140 at a distance of about three feet from the lot lines. It appears, however, that the railroad company has ballasted its tracks, which are laid on a level with the grade of the streets, with crushed stone, so that the entire space between J and G streets is a level and hard-beaten surface or roadway which the public uses for the purpose of travel by teams and by pedestrians; that J street is open across the plaintiff's tracks, and sidewalks are maintained on each side of said street, so that there is an open roadway for the use of the traveling public from the west side of plaintiff's tracks to the main part of the city of Lincoln. It appears that H street is partially closed by an elevator, situated partly on the lot and partly in the street, at the southeast corner of block 134, which is east of block 135, and that G street is partially closed by the coalhouse of one George Bauer; that there is only one house on lot 1, in block 135, and the persons residing therein have access to the main part of the city on J street, on each side of which sidewalks are maintained, as above stated; that there are no other persons residing on any part of block 135; that in the vicinity of that block are the Burlington Railroad tracks and other railroad properties, and the Burlington Railroad Company has purchased that block, with the exception of lot 1, on which the residence above mentioned stands, and has removed all of the houses

that before the purchase stood on that block. It further appears from the evidence of the defendant's witnesses that G street is open from Third street east to the main part of the city, and there is plenty of room to travel on the sidewalk from G to F streets on the west side of plaintiff's track; that the persons living on the northeast corner of lot 1, in block 135, have a street and a sidewalk direct from their place to the business part of the city; that there are no residences in block 113, and none in block 112; that no one lives west of block 135, and that the ground in that vicinity is all occupied by railroad yards; that all the persons residing west of the Union Pacific tracks have free access to the city on G and F streets, but there is no crossing established on G street. It appears, however, that there is a hard, solid track or roadway on that street across the Union Pacific tracks, and there is ample room between the tracks of the Union Pacific Railroad Company, called B and C, on Fourth street, for the passing of any number of teams and pedestrians; that it is a hard, solid crushed stone pathway, and leads straight up to J street, where there are sidewalks, as above stated. It also appears that there is no reason why H and G streets should not be opened for travel if the public necessity requires it. It further appears that to require the railroad company to remove the track in question 35 feet east of its present location opposite block 135 will require the company to place that track on the top of its extension track B, and thereby destroy the use of both of said extension tracks, with no corresponding benefit to any one. It must also be observed that the ordinance in question does not require the railroad company to remove its west extension track at any other point, except opposite block 135, and to make such removal would in effect segregate a part of that track and destroy its use.

The record shows that the track in question is necessary for the use of the company in serving the public and its patrons in the city of Lincoln, and to enforce the ordinance in question would result in no benefit to any one.

We are therefore of opinion that the city should be enjoined from enforcing the ordinance in its present form, and thus destroy the use of the west extension track on Fourth street. It is not the purpose, however, of the court in this case to prevent the city from assuming proper control of Fourth street when public necessity requires it.

The right to exercise the police power by the city cannot be surrendered or abridged, and, when a franchise is granted to use the city streets for railroad purposes, the grantees accept the right subject to the reasonable and necessary exercise of the police power; but, if any regulation is adopted by the virtue of that power, it must be reasonable, and must not defeat the purpose of the grant. The basis for the exercise of the police power is the protection of human life and the promotion of the public convenience and welfare, and the privilege of the railroad company is subject to the duty of the city to repair, alter or improve the streets in such a manner as the city may deem reasonably proper for the public benefit. The construction of a sidewalk on the west side of Fourth street would be a proper exercise of this duty, and the city would have the right to compel the company to move its sidetrack far enough so that the sidewalk space could be used for that purpose. But it is our view that the enforcement of the ordinance in its present form is unreasonable, unnecessary and oppressive, and should be enjoined.

The judgment of the district court is therefore reversed, and plaintiff is granted an injunction permanently restraining the enforcement of the ordinance in question, and judgment will be rendered accordingly.

JUDGMENT ACCORDINGLY.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

HENRY F. SCHEVE, APPELLEE, V. W. E. VANDERKOLK ET AL., APPELLEES; KOENIG & COMPANY, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,894.

1. **Fraudulent Conveyances:** REMEDY OF CREDITORS: BULK SALES. Where the owner of a stock of implements sells his stock in bulk without complying with the provisions of section 2651, Rev. St. 1913, commonly called the "Bulk Sales Law," and immediately thereafter dies intestate and insolvent, a creditor of the seller, as soon as he ascertains the facts, may proceed in a court of equity for the appointment of a receiver to impound the stock of goods, have the same sold, and the proceeds applied to the payment of his claim.
2. ———: ———: ———. In such a proceeding the other creditors of the seller may intervene, and the court may distribute the proceeds of the sale *pro rata* among the several creditors according to the amounts of their claims.
3. ———: ———: ———. In such case the creditors of the decedent will not be required to reduce their claims to judgment and have executions returned *nulla bona*, nor file them in the probate court for allowance, before they can proceed to impound the stock of goods and subject it to the payment of their claims.
4. ———: BULK SALES: PURCHASER A TRUSTEE. In such a case the purchaser in possession of the stock of goods who has not complied with the bulk sales law will be held to have received the property in trust for the benefit of the creditors.
5. ———: ———: CREDITORS' SUIT: PARTIES. The person in whose possession the goods are found is a necessary party to the proceedings, but other purchasers through whose hands the goods have passed, and who are shown to have no creditors and no present interest in the property, are not necessary parties, and the action may be dismissed as to them, when they seek no affirmative relief.

APPEAL from the district court for Jefferson county. LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

John C. Hartigan and *E. A. Wunder,* for appellant.

Hinshaw & Hinshaw, Heasty, Barnes & Rain, F. N. Prout, E. A. Coufal, Mills & Beebe, L. S. Hastings and *C. H. Denney, contra.*

BARNES, J.

This action was commenced by a creditor of one George Lightbody, deceased, for the appointment of a receiver, and for the disposal of a stock of goods, wares and implements which had been sold in violation of the provisions of section 2651, Rev. St. 1913, commonly called the "Bulk Sales Law," against the purchase of the stock at bulk sale, in possession. A receiver was appointed, all of the creditors of Lightbody intervened, and by proper pleadings asked for the same judgment which the original plaintiff had prayed for. On the final hearing the district court found that the sales were void, found the amount due each of the creditors, ordered the stock of implements sold, and distributed the proceeds among the several plaintiffs according to the amounts of their claims, dismissed the action as to the defendants Vanderkolk and Milligan, and the copartnership, composed of Sandman, Koenig and Bishop, has appealed.

It appears that George Lightbody of Harbine, which is a small village in Jefferson county, on October 25, 1911, sold his stock of implements to W. E. Vanderkolk, without complying with the bulk sales law; that within five days thereafter Vanderkolk sold the stock to William Milligan, without complying with said law, and on November 1, 1911, Milligan sold the stock to Charles Sandman, Lewis B. Koenig and William T. Bishop, partners doing business as Koenig & Company, without complying with the provisions of the section above mentioned. It further appears that Sandman, one of the partners, was the president of the State Bank of Harbine, and at all times from July 21, 1911, until after November 2, of that year, knew that the plaintiff was surety for Lightbody on a note for $2,000 due the bank, and which the plaintiff was obliged to pay. On November 2, 1911, Lightbody died intestate and insolvent. On November 23, 1911, and before the appointment of an administrator of his estate, the plaintiff brought this action, asking for a receiver to take charge of said goods, sell the same, and apply the proceeds to the payment of the debts of decedent. The goods were

sold by order of the court, and a decree was entered that all the sales were fraudulent and void as having been made in contravention and defiance of the bulk sales law. The court rendered a judgment in favor of the several creditors, and ordered the proceeds of the sale to be distributed *pro rata.*

It is the contention of the appellant that the creditors' claims must have been reduced to judgment and executions returned *nulla bona* before this action could be maintained; and it is argued that a creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim. Neither is he entitled to a decree canceling fraudulent transfers already made. That this is the rule in ordinary cases must be conceded. But this rule, like all others, has its exceptions, and the transactions, of which complaint is made, seem to be within the exception. Smith, Equitable Remedies of Creditors, sec. 167.

It is further contended that the claims of the creditors should have been filed and allowed in the probate court before this action could be maintained. It must be observed, however, that this is not a probate proceeding. Lightbody had parted with his interest in the property before his death, and immediately died insolvent. His heirs had no interest in the property, and could not have invoked the provisions of the bulk sales law. The creditors were the only parties who could complain. The insolvency of Lightbody was alleged in the petition and was admitted by the answer. An execution would not run against the administrator of the insolvent estate. *Kennedy v. Creswell,* 101 U. S. 641; Smith, Equitable Remèdies of Creditors, sec. 167; *Steere v. Hoagland,* 39 Ill. 264; *Smalley v. Mass,* 72 Ia. 171.

The courts, wherever this question has been presented, have held that the creditors would not be required to do a vain thing. In *Merchants Nat. Bank v. McGee,* 108 Ala. 304, it was said: "A simple contract creditor may file a bill to subject property alleged to have been fraudulently

conveyed by his deceased debtor, while in life, on an averment of deficiency of legal assets." It was further said: "The theory on which the bill proceeds, in such cases, is that the fraudulent donee stands in the relation, and is chargeable, as an executor *de son tort;* and he is allowed to make any defenses, which the debtor in life, or the rightful personal representative, could have made. * * * It does not follow, where a deceased debtor who had fraudulently conveyed his property in his lifetime, and dies insolvent, and there is a deficiency of legal assets out of which a creditor's claim can be satisfied, and there has been no administration on his estate, that a simple contract creditor is debarred on that account to file his bill against the fraudulent grantee for the purpose of reaching and subjecting the property fraudulently conveyed to the satisfaction of his claim." We think that in the light of the foregoing authorities appellant's contention cannot be sustained.

The constitutionality of the bulk sales law is not assailed in this case. But it is contended that a second purchaser takes the property without regard to the provisions of the statute, and therefore the creditors in this case cannot maintain an action against the defendant Koenig & Company to subject the property to the payment of their claims.

A like question was before the supreme court of Michigan in *Humiston, Keeling & Co. v. Yore,* 148 N. W. (Mich.) 266. It was there said: "The admitted violation of the bulk sales law (Pub. Acts 1905, No. 223), declaring the sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of business void as against creditors, gives a court of equity jurisdiction of a bill by a creditor, joining other creditors of the seller, to reach and apply the property by declaring the purchaser a receiver in trust for creditors, and by an injunction and an accounting."

The question was again before that court in *Coffey v. McGahey,* 148 N. W. (Mich.) 356. That was a case very like the one at bar. There the creditor had sold his

merchandise in bulk without a compliance with the bulk sales law, and the purchaser had sold and delivered the property to another. It was there said: "Under the bulk sales act (Pub. Acts 1905, No. 223), providing that creditors, upon knowledge that the requirements of the act have not been followed, may apply to have the purchaser become a receiver and account to creditors, the rule that a creditor must obtain a judgment at law before resorting to equity does not apply; and, apart from the statute, the rule is subject to exceptions, where a judgment cannot be had because the debtor is dead, has absconded from the state, and has no property therein." It was further said: "Under the bulk sales act, * * * a bill in behalf of complainant and all other creditors of the seller upon the theory that the statute made the debtor's sale absolutely void, and that his creditors could apply the property to their claims, by receivership, injunction, and an accounting, and not on the theory of a creditor's bill or a bill in aid of execution, the complainant would not be denied equitable relief, on the ground that he had an adequate remedy at law, though the equitable remedy is not exclusive." It was said in the opinion in that case: "Any and all creditors may, as soon as knowledge comes to them that the requirements of the statute have not been followed, proceed immediately, not to set aside the sale, but to impound the property or its proceeds. Upon application of any of the creditors, 'any purchaser shall become a receiver and be held accountable,' etc., is the reading of the statute, and for this reason the judgment creditor rule does not apply."

The supreme court of Michigan has also held that in such cases it is optional with the creditor to proceed by garnishment or to ask to have a receiver, and it is immaterial that the purchaser of the stock was ignorant of the requirements of the statute; that such sale is void, and the purchaser is a trustee for the creditors. It may be observed that the provisions of the Michigan statutes are but declaratory of the equity provisions which are usually enforced by courts of equity in this country.

It appears, in the case at bar, that the several purchasers of the stock of implements in question were ignorant of the existence of the bulk sales law, but that fact can avail them nothing, because no one will be presumed to be ignorant of the law. While it may seem a hardship to deprive Koenig & Company of the stock of implements in question, we fail to see how the courts could grant them any relief. It is quite apparent that the decree of the district court, which declared the sales void, and that the defendant Koenig & Company, who purchased and had possession of the stock of implements in question, were trustees for the benefit of the creditors, was right, and it was not error to dismiss the action as to Vanderkolk and Milligan, who had parted with the possession of the stock of implements in question.

The judgment of the district court is

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

MACK C. GOODWIN, APPELLEE, V. FRANK L. HALLER, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,914.

1. **Brokers:** RIGHT TO COMMISSION. Where the owner of personal property employs several agents to sell the same, but gives neither of them an exclusive agency, the agent or broker who actually effects the sale is entitled to the commission.
2. ———: ACTION FOR COMMISSION: SUFFICIENCY OF EVIDENCE. The evidence is found to be sufficient to sustain the verdict.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Charles W. Haller for appellant.

A. S. Ritchie and *Charles L. Fritscher, contra.*

BARNES, J.

This was an action to recover the sum of $150 as a commission on the sale of an automobile. The suit was commenced on the justice side of the county court of Douglas county, and after trial was appealed to the district court, where, on a trial to a jury, a verdict was returned in favor of the plaintiff, on which a judgment was entered, and the defendant has brought the case to this court by an appeal.

It appears that the defendant was the owner of an automobile, and, desiring to sell it, sent a circular letter to several persons, the plaintiff included, which reads as follows:

"April 16, 1909. I have decided to sell my last year's Mitchell automobile for $1,200, instead of waiting to get $1,500 for it. This is a great bargain because I paid $2,500 for it last year and it has only been run about four months. It is in A 1 condition. All slightly worn parts have been replaced by new. There is $150 in it for the man who sells this car for me.

Yours truly,

F. L. Haller."

The testimony clearly shows that the plaintiff sold the automobile to a man by the name of Cornelius for $1,250, and that the defendant received all of the proceeds of the sale. It also appears that three other parties were attempting to make a sale of the machine, but the sale was in fact effected by the plaintiff, and none of the other persons made any claim for compensation for the sale, which the plaintiff actually made. The plaintiff showed that he had demanded payment from the defendant, which was refused. The evidence was amply sufficient to sustain the verdict; but it is contended that the trial court erred in giving the third paragraph of his instructions to the jury. The instruction complained of reads as follows:

"Where the owner of personal property authorizes or employs several agents to sell the same, but gives neither an exclusive agency, the agent or broker who actually effects the sale is entitled to a commission. The agent under

such contract who negotiates with the purchaser, but does not effect the sale, cannot recover a commission; and, before the plaintiff in this cause can recover, he must show you by a preponderance of the testimony that he actually effected the sale of the automobile, and, if he has failed to do so, he cannot recover."

This instruction seems to accord with the rule announced in *Lewis v. McDonald,* 83 Neb. 694, and the same rule has been approved in other jurisdictions. *Byers v. Williams,* 175 Mich. 385; *Fenton v. Miller,* 153 Ia. 747; *Whitcomb v. Bacon,* 170 Mass. 479; *Votaw v. McKeever,* 76 Kan. 870.

It thus appears that the only issue presented by the pleadings in this case was properly submitted to the jury, and, the evidence being found sufficient to sustain the verdict, it will not be set aside by a reviewing court.

It is claimed, however, that the sale was not made according to the terms of the contract. On this point it appears that the defendant only asked $1,200 for the automobile, while it was sold by the plaintiff for $1,250, which the defendant received, and therefore has no cause of complaint on that score.

It also appears that, in order to effect a sale, the plaintiff agreed to sell a buggy for the purchaser for the sum of $70, and that he made such a sale. We are unable to see how this, in any way, was prejudicial to the rights of the defendant. As we view the record, the proceedings were without error, the judgment of the district court was right, and it is therefore

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

JOHN H. CREIGHTON, APPELLANT, V. ALFRED KEENS ET AL., APPELLEES.

FILED NOVEMBER 12, 1914. No. 17,887.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISK. An experienced workman left to his own discretion as to the manner of performing a task under a general order, who selects a dangerous method of doing the work instead of a safe method, which is equally open to him, cannot recover from his employer for consequent injury.
2. ———: ———: NEGLIGENCE. An employer has the right to assume that a man of mature years is possessed of the usual powers of observation, and such knowledge and judgment as is acquired by common experience.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Guile & Guile, for appellant.

J. B. Strode, contra.

LETTON, J.

After a former judgment for plaintiff in this case had been reversed on appeal, a new trial was had upon the same pleadings. The essential parts of these are set forth in the former opinion by Sedgwick, J., 89 Neb. 637. At the trial, at the close of the testimony on the part of plaintiff, defendants moved for a directed verdict. The motion was sustained and the cause dismissed. From this judgment plaintiff has appealed.

The main facts are detailed in the former opinion. Much stress is laid by plaintiff on the fact that, at the time he went with Mr. Keens to look at the work in the church, he suggested that the scaffolding ought to be erected by carpenters, and that Keens then told him to use the appliances they had. It appears, however, that the walls of the main body of the church were about 40 feet high, while those of the Sunday school room, in which the ac-

cident occurred, were much lower, and there is no proof that permanent scaffolding erected by carpenters was necessary or usual in painting walls of the height of those where the accident occurred. Plaintiff testified that the scaffold consisted of a single plank resting upon a trestle at one end and a ten-foot stepladder at the other, with a short stepladder of six or seven feet reaching from this plank to the wall; that the reason he could not have a wider scaffold was because the stepladder upon which the plank rested was not wide enough; that there was another trestle in the church that he could have used; that he helped another workman prepare this scaffold; that he supposed he spoke to him about getting the other trestle, but the other man's shoulder was dislocated, and he could not carry it from the other part of the church. He did not call one of the other men to bring it, although he could have done so. He admitted that at the former trial he testified as follows: "Q. If you had used the two trestles, instead of one trestle and a stepladder, would the scaffolding have fallen? A. It might not. * * * Q. Isn't it your judgment now, Mr. Creighton, that if you had used the two trestles to build up your scaffolding instead of using one stepladder and a trestle this accident would not have happened? A. Yes, sir." Furthermore, while admitting he could have done the work by using an ordinary ladder, his explanation why one was not used instead of the dangerous appliance is unsatisfactory.

Other witnesses for plaintiff testified that the use of the stepladder to support one end of the plank and the trestle to support the other was not as safe as if both trestles had been used, and that, if so used, the arrangement would have been as safe as most scaffolds. There is testimony that a small stepladder should not be used on the top of a ten-foot scaffold, but we cannot see its relevancy to the vital question in the case.

The plaintiff, who had some measure of direction of the work, though not a foreman, assisted in the erection of a defective and dangerous scaffold. This condition was so apparent that it would seem that almost any man of rea-

sonable understanding would have realized its precarious and unsafe nature. At the same time the means were at his disposal and near at hand with which to provide a safe one. He obviously assumed the risk of using the defective structure.

We think he was also guilty of contributory negligence. The principles are clearly stated, as follows: "An experienced servant left to his own discretion as to the manner of performing a task under a general order, who selects a dangerous method of doing the work instead of a safe method, which is equally open to him, cannot recover from the master for consequent injury. * * * The master has the right to assume that an experienced servant of mature years is possessed of ordinary mental faculties, the usual powers of observation, and such knowledge as is acquired by common experience." *Illinois C. R. Co. v. Swift,* 213 Ill. 307.

It is also said: "Where, however, the employee is not directed to do the work in a specific manner, but is given a general order to perform the task, and is himself left to use his own discretion as to the manner in which the work shall be done, and there exists a safe way and a dangerous way, which are equally open to him, if he selects the unsafe method through heedlessness or because it involves less exertion on his part, and injury to his person results, he cannot recover. *Pennsylvania Co. v. Lynch,* 90 Ill. 333; *Illinois C. R. Co. v. Sporleder,* 199 Ill. 184."

The district court did not err in directing the jury to find for defendant, and its judgment is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

ARTHUR B. WOOD, TREASURER, APPELLEE, V. MCCOOK WATER-WORKS COMPANY, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,845.

1. **Taxation:** ASSESSMENT OF PERSONAL PROPERTY. The revenue law as to the assessment of personal property examined, as set out in the opinion, and construed to mean that such property shall be listed and assessed with reference to the quantity held or owned on the 1st day of April in the year for which the property is required to be listed.
2. ———: ———: EVASION. One who owns personal property subject to taxation at the time when it is returnable for assessment and taxation for any year cannot escape liability for the tax for such year by subsequently devoting the property to a purpose which would thereafter render it not subject to taxation, nor by a sale of such property to a municipal or other corporation, in whose hands such property thereafter would not be subject to taxation.

APPEAL from the district court for Red Willow county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Frank E. Bishop, John E. Kelley and *C. E. Eldred,* for appellant.

W. M. Somerville and *C. D. Ritchie, contra.*

FAWCETT, J.

This action was brought by plaintiff in his official capacity, in the district court for Red Willow county, to recover taxes upon personal property assessed against the defendant for the year 1911. A general demurrer to the petition was overruled, and, defendant declining to plead further, judgment was entered for plaintiff for the amount of the tax. Defendant appeals.

The petition alleges substantially: That on April 1, 1911, defendant was a corporation, with its principal office and place of business and all of its property, upon which the tax was assessed, located in the city of McCook, and also in school district No. 17; that on that date defendant was engaged in selling water to the city of McCook and its

inhabitants, was the owner of a valuable plant and of a franchise permitting it to engage in such business in that city; that on or about May 20, 1911, defendant, for the purpose of listing its franchise and personal property for taxation, made out a sworn statement and delivered the same to the assessor; that by such statement the company listed and valued all tangible personal property owned by it on the 1st day of April, 1911, at the sum of $43,550; that thereupon the assessor duly fixed and made a valuation of such property on the 1st day of April, 1911, at the sum named and fixed and made the assessed valuation thereof at the sum of $8,710; that on or about the 27th day of July, 1911, there was levied against the property a tax of 6.5 mills for state purposes, and on the 3d day of August, 1911, there was levied a tax for county, state and school district purposes aggregating 41.1 mills; that by reason of such listing, assessing and levying of taxes there became due and owing from defendant to plaintiff, as treasurer, the sum of $811.77 personal tax, no part of which has been paid; that on October 30 the said assessments were duly transcribed into the tax list of the county clerk, and on or about that date the county clerk attached a warrant to such tax list commanding the treasurer to collect the same; that on the 1st day of July, 1911, the defendant sold and delivered its water-works plant and all property connected therewith to the city of McCook, for the sum of $65,000; that on February 1, 1912, plaintiff issued a distress warrant directed against defendant for the amount of the tax and interest, and on February 8 the warrant was returned unsatisfied. Wherefore the plaintiff prays judgment for $811.77, with interest at the rate of 10 per cent. per annum from the 1st day of December, 1911.

The assignments of error are that the court erred in overruling the demurrer and in rendering judgment against defendant. The contention of defendant is that the sale and delivery by defendant of its property to the city of McCook on July 1 was prior to the completion of the assessment for 1911, and prior to the levy of any tax for that year; that the property was exempt from taxation

as soon as it became the property of the city; that the assessment was not completed and did not become final until after the value, as found by the local assessor, had been corrected by the county assessor and equalized by the county and state boards of equalization; that the levy of tax was not made and did not become a lien until after the property had been transferred to the city; that "the principal question involved then is: The property having been transferred into the hands of the city of McCook, where it was exempt from taxation, prior to the time the assessment was completed, and levy of tax made, and prior to the time when the tax would become a lien upon the property, was the attempted taxation void?" The district court answered this question in the negative.

In a typewritten memorandum, submitted by counsel for defendant by leave of court after the arguments at the bar, it is claimed that the statute does not fix any definite date when personal property shall be assessed either as to valuation or ownership; that the whole matter of assessment is progressive, and is not concluded until the work of the assessor, the county board and the state board is completed in the final levy made after all their work is done, which was August 3 in this case.

Prior to 1903, section 6, art. I, ch. 77, Comp. St. 1901, of the revenue law, provided: "Personal property shall be listed between the first day of April and the first day of June of each year, when required by the assessor, with reference to the quantity held or owned on the first day of April in the year for which the property is required to be listed." By an act approved April 4, 1903 (laws 1903, ch. 73), the legislature provided a system of public revenues, and repealed all of article I, chapter 77, as it had existed prior thereto. In the new act section 6, art. I of the prior act, above quoted, seems to have been omitted, but that the legislature did not intend to change the rule that assessments of personal property are based upon the amount of property owned by the taxpayer on April 1 is shown by the oath which the taxpayer is required to make to the schedule furnished him by the assessor, which is:

"I, ————, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on the first day of April. * * * I further swear that, since the first day of April of last year, I have not directly or indirectly converted or exchanged any of my property temporarily, for the purpose of evading the assessment thereof for taxes, into nontaxable property or securities of any kind." Laws 1903, ch. 73, sec. 52. This oath has ever since been required of all taxpayers, and is now provided for in section 6339, Rev. St. 1913.

That the revenue law as to the assessment of personal property has been so construed by all taxing officers and taxpayers of the state since the act of 1903, the same as prior thereto, is a matter of common knowledge. Such being the fact, the courts will so construe it until the legislature has further spoken on the subject. The petition alleges that, after defendant made and delivered its schedule to the assessor on or about May 20, the assessor thereupon "duly fixed and made a valuation of all the tangible personal property belonging to said corporation on the first day of April, 1911." If the assessor "duly" fixed and made his valuation, he did so on or before the 1st day of June, 1911. Comp. St. 1909, ch. 77, art. I, sec. 116. It appears, therefore, from the allegations in the petition, that, at the time defendant sold the property covered by the schedule which it filed May 20, such property had been duly assessed by the county assessor a full month prior to the time of such sale. Conceding the defendant's contention that the assessment did not become final until after it had been acted upon by the state and county boards of equalization, we do not see how that can aid it. It knew that it had been assessed by the county assessor in the sum of $8,710, and that any tax levied upon that assessment would impose upon it a personal liability therefor. If any change in conditions had occurred after it had returned its schedule and an assessment had been made thereon by the assessor, which would have authorized the county board of equalization to give it any relief, it should have

applied to that board when it met on or about July 27, and if the board had denied any relief to which it was entitled, the statutes provided a plain and adequate remedy by appeal to the district court.

Did the sale of the property on July 1 to the city, cancel defendant's liability upon the assessment because of the fact that after the property passed to the ownership of the city it thereafter would not be liable to taxation? We think the answer to this question must be adverse to defendant. The case is not different from what it would be if, after defendant had filed its schedule and the assessor had made the assessment, and while still owning the property, it had changed the use of it to a purpose which would relieve it from taxation. Such a change would not relieve it from liability. *People v. Commissioners,* 104 U. S. 466. In that case the relator was assessed for taxation as of January 1, 1876, upon his personal estate, to the amount of $60,000. He made application, supported by affidavit, for a reduction or remission of his assessment upon the ground that the value of all his personal estate on January 1 did not exceed $125,000, and that as to all except $5,500 it consisted of money which "was continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the customs department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different states of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports." The reduction and remission were both denied. Upon writ of *certiorari* the proceedings of the tax commissioners were affirmed in the supreme court of the state of New York, and its judgment was affirmed by the court of appeals, whereupon relator prosecuted error in the supreme court of the United States. In the opinion by Mr. Justice Harlan it is said: "The plaintiff in error was assessed, upon his personal property, as of January 1, 1876. If the capital, which he claims was uniformly and continuously employed in the business of purchasing cotton for exportation from

the United States to foreign countries, through the customs department, was, in fact, in money on the 1st day of January, 1876, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries." (If it had been so invested on the 1st day of January, it would not have been subject to taxation.) It will be observed that the court expressly holds that one who owns property subject to taxation at the time when it is returnable for assessment and taxation cannot escape liability for the tax by subsequently changing the character of his property by investing it in other property which would render it not subject to taxation. Suppose defendant, on July 1, had sold its property which had been assessed, and with the money obtained from the sale had purchased United States bonds, could it have escaped the payment of taxes? Clearly not. The fact that the assessment and the tax subsequently levied thereon had not become a lien upon the property, so as to make a purchaser thereof liable for the tax, is entirely immaterial. The city, of course, took the property free from any lien of the tax, but this did not relieve the defendant of its liability therefor.

The demurrer was properly overruled.

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

DANIEL A. HANEY, APPELLANT, V. VILLAGE OF HYANNIS, APPELLEE.

FILED NOVEMBER 12, 1914. No. 17,849.

Municipal Corporations: SUIT TO DISCONNECT LAND: SUFFICIENCY OF EVIDENCE. The evidence examined and set out in the opinion, *held*, ample to sustain the judgment of the district court.

APPEAL from the district court for Grant county: JAMES R. HANNA, JUDGE. *Affirmed.*

Sullivan & Squires, for appellant.

Boyd and *Barker, contra.*

FAWCETT, J.

Plaintiff instituted this action in the district court for Grant county, for the purpose of having certain land disconnected from the village of Hyannis. Upon a full hearing after issues joined, his petition was dismissed for want of equity. From this judgment he appeals.

The statute under which plaintiff proceeded is section 8978, Ann. St. 1911, which provides that, if "justice and equity require that such territory, or any part thereof, be disconnected from such city or village," the district court shall enter a decree accordingly. The law upon the question involved is well settled in this state. In *Village of Wakefield v. Utecht,* 90 Neb. 252, we held: "In an action to annex additional territory to a village, the burden is upon the village to establish by sufficient averments and evidence that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed." By analogy the holding must necessarily be that, in an action to disconnect territory, the burden is upon the petitioner to establish by sufficient averments and evidence that justice and equity require that such territory be disconnected. In *Chapin v. Village of College View,* 88 Neb. 229, we held that a judgment of the district court in a proceeding to exclude territory from the boundaries of a municipal corporation will not be set aside on appeal, unless it is made to appear that the trial court committed an important mistake of fact, or made an erroneous inference of fact or of law. On page 231 will be found a citation of former decisions of this court to the same effect.

Plaintiff purchased the land, which he now seeks to have disconnected, about five years prior to the commencement of this action, which was several years after the incorporation of the defendant, so that he purchased it with full knowledge that it was within the limits of the village.

By his own testimony he shows that he is the owner of a stock ranch about 30 miles from the village, upon which, at the time of the trial, he had between 500 and 600 head of horses and cattle; that he had upon the ranch a dwelling-house and barn and sufficient accommodations for his wife and five children, and that his family had lived upon the ranch prior to the purchase of the village property; that his purpose in purchasing the village property was "to get close to a school;" that at the time of the trial he had four children of school age, one of whom was in the eighth grade and would pass into the high school the next year; that, with one possible exception, the high school in Hyannis is the only high school in the county; that he is not engaged in any business in Hyannis, but spends the major portion of his time upon his ranch, his family living in the home which he has established upon the property in controversy; that all of the 50-acre tract in controversy, except some five or six acres on which he maintains his home, is rough land and used by him for pasture; that all of the stock he keeps in the village is a cow and one team for the use of his family; that he occasionally has four horses there when he is "freighting." He testified that he farmed from four to six acres of the land in connection with his village home. On cross-examination he shows that that is all the land there is fit to farm. "Q. And where you raise a garden? A. Raise some corn and potatoes and garden. Q. And that was for you and your family there, wasn't it? A. Yes, sir. Q. And corn for your team? A. No; I didn't raise any corn to speak of. Q. When you told the court you were farming it, you meant to say you were gardening it? A. I have it in alfalfa, some of it. Q. How much? A. Two or three and a half or four acres." He further testified: "Q. Do you make any of your living off of this place, with the exception of what you raise in your garden and what alfalfa you raise for your team? A. No. Q. You make your living from your ranch? A. Principally, yes. * * * Q. All that you farm there or use for any agricultural purposes is a little over five acres? A. About five or six. Q. And that's the

part you just use for your home purposes, and don't attempt to make a living there, do you, simply a little side issue with you there, isn't it? A. Yes, sir. * * * Q. State what benefit anybody else off Main Street enjoys that you haven't enjoyed during the last six years. A. Well, I don't call any to mind now." A short time prior to the commencement of this action the village voted $8,800 for the construction of a water-works system. Prior thereto it is evident that plaintiff was entirely satisfied with conditions existing in the village, but the issuance of water bonds did not meet his approval. He testifies that he voted against issuing the bonds. When asked why he did so, he answered: "I didn't feel able to pay the tax. Q. You felt you were too far away to get the use of this water at first? A. Yes, sir. Q. You didn't think you were going to get any of this water? A. I don't think I am." Outside of the indebtedness about to be incurred upon the water bonds, the village seems to have been in a very prosperous condition, so much so that it had no bonded indebtedness, and during the year 1911 no taxes were levied for any purpose whatever. Plaintiff's reason for thinking that he would not derive any benefit from the water-works about to be installed is based upon the fact that on the initial instalment of water-works the plans contemplate only the extension of mains through the main street and the main part of the village; plaintiff's land being on the eastern limits of the village. This fact is far from showing that extensions will not be made in course of time as fast as the funds and necessities of the village will warrant the making of such extensions.

In the light of the above facts, the district court very properly dismissed plaintiff's petition for want of equity.

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. JAMES P. ENGLISH, COUNTY ATTORNEY, APPELLEE, V. CHARLES E. FANNING ET AL., APPELLANTS.

FILED NOVEMBER 12, 1914. No. 17,670.

1. **Nuisance:** ABATEMENT: PURPOSE OF ACT: CONSTRUCTION. Chapter 63, laws 1911, is entitled "An act to enjoin and abate houses of lewdness, assignation and prostitution, to declare the same to be nuisances," etc., and it is designed to provide means of suppressing houses devoted to such purposes. A house maintained as a place for lewd men and women to congregate for immoral purposes is within the terms of the statute.

2. ———: ———: ENFORCEMENT OF ACT. The statute is strenuous; there should be proof that the place complained of is in fact a house of lewdness, assignation or prostitution. When that fact is satisfactorily established, the statute should be liberally construed in applying the remedy given.

3. ———: ———: EVIDENCE: "GENERAL REPUTATION." The general reputation of the house and of the people, men and women, who frequent it may be shown, but it must be the general reputation among people who are in the position to form an opinion. Proof of such general reputation is received as other evidence in the case, and is not of itself necessarily conclusive.

4. ———: STATUTE TO ABATE DISORDERLY HOUSE: VALIDITY: QUÆRE. The fourth paragraph of the syllabus of our former opinion in this case (96 Neb. 123) is withdrawn, and the question whether section 8782, Rev. St. 1913, providing for a tax of $300, and the payment of a fraction thereof to the attorney prosecuting the case, is unconstitutional is not decided.

5. **Quære.** Whether that part of section 8779, Rev. St. 1913, which provides that, if the existence of a nuisance is established in a criminal proceeding (see Rev. St. 1913, secs. 8783, 8845), an order of abatement shall be entered the same as in the action in equity provided for in preceding sections, is constitutional and valid, *quære.*

6. **Constitutional Law:** NUISANCE: VALIDITY OF STATUTE. Our former decision in this case as to the constitutionality of chapter 63, laws 1911, except as above indicated, is adhered to.

7. **Nuisance:** SUIT TO ABATE: SUFFICIENCY OF EVIDENCE. The evidence indicated in this and our former opinion herein is found insufficient to support the decree.

Rehearing of case reported in 96 Neb. 123. *Former judgment vacated, and judgment of district court reversed.*

SEDGWICK, J.

On the former hearing in this case we found that the portion of the decree "which enjoins Fanning and Prenica from using the premises for the purpose of lewdness, assignation or prostitution is not appealed from, and is therefore final," and that the "defendants make no complaint of the findings and decree so far as it finds that unlawful practices were indulged in and enjoins the continuance of the same in the future." 96 Neb. 123. The record is large and somewhat complicated, but upon further consideration we think it ought to be considered that the appeal has brought up the whole case for consideration.

The defendants strenuously contend that the statute under which these proceedings are brought (laws 1911, ch. 63) is unconstitutional and void. Upon the former hearing it was practically conceded that section 8 of the act (Rev. St. sec. 8782) is unconstitutional, and it was so considered accordingly. Very soon after our former decision the supreme court of Minnesota, in *State v. Ryder*, 126 Minn. 95, 147 N. W. 953, had occasion to consider the constitutionality of a very similar statute. The discussion in that case covers all objections raised in the case at bar, unless it is the one which will be herein separately considered. The discussion by the Minnesota court of the constitutionality of their statute corresponding to our section 8 is quite full and complete, several authorities being cited, and the court concludes that the statute is constitutional and valid. The reasoning seems satisfactory, but it is not necessary now to decide as to the constitutionality of section 8 of our act, and we content ourselves with withdrawing what was said upon that point in the former decision of this case.

As we have already said, the opinion of the Minnesota court in the case above cited, and the opinion in *State v. New England F. & C. Co.*, 126 Minn. 78, decided at the same time by that court, seem to satisfactorily dispose of all

questions as to the constitutionality of such legislation, except one which is perhaps peculiar to our statute.

Section 5 of the act (Rev. St. sec. 8779) provides: "If the existence of the nuisance be established in an action as provided in this act, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and effectual closing of the building or place against its use for the purpose, and so keeping it closed for a period of one year, unless sooner released." Section 8783 (208) Rev. St. 1913, is as follows: "Every house, building, tent, boat, wagon or other vehicle, or any other structure, situated in this state, used and occupied as a house or place of ill fame or for purposes of prostitution, shall be held and deemed a public nuisance; and any person owning, or having the control of, as guardian, lessee or otherwise, such house, building, tent, boat, wagon or other vehicle, or any other structure, and knowingly leasing or subletting the same, in whole or in part, for the purpose of keeping therein a house or place of ill fame, or knowingly permitting the same to be used or occupied for such purpose, or using or occupying the same for such purpose, shall for every such offense be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not to exceed three months." This was section 210 of the criminal code prior to the revision of 1913, as amended by ch. 173, laws 1907. The amendment included other buildings and structures than those named in the original act and increased the penalty. It is insisted that the act under which this prosecution was brought is unconstitutional because it amended sections 8783(208) and 8845(270) Rev. St. 1913. It would seem that section 5 of the act, by the words "or in a criminal proceeding," attempts to amend section 210 of the criminal code (Rev. St. 1913, sec. 8783(208)) by adding an additional penalty upon conviction under that

section. If this should be considered as an amendment to that section within the meaning of section 11, art. III of the constitution, it would not necessarily render the whole act invalid, since those words are separable from the act and may be omitted without affecting the remainder of the act.

Except as herein noted, we are satisfied with our former conclusion as to the constitutionality of the act. This requires us to consider whether the evidence justifies the finding that the building in question is used for the purpose of lewdness, assignation, or prostitution, within the meaning of the act. It is entitled "An act to enjoin and abate houses of lewdness, assignation and prostitution, to declare the same to be nuisances," etc. Laws 1911, ch. 63. Section 3 of the act provides: "Evidence of the general reputation of the place shall be admissible." This does not contemplate receiving testimony as to the opinions of personal enemies of the proprietor, nor their declarations, though publicly made, but contemplates proof of what is generally reported among those who are in a position to form an opinion of the character of the house. Mr. Bishop says: "There must be the keeping of a house. For a woman to be a common bawd, or merely to live alone and receive one man or many, is not to keep a bawdy house. And more women than one must live or resort together to make such a house. Therefore permitting a single act of illicit intercourse will not alone constitute the offense." 1 Bishop, Criminal Law (7th ed.) sec. 1085. It has been held that the reputation of the keeper of the house, and of the people, both men and women, who frequent it, may be proved, but it is generally held that the reputation of the house alone is not sufficient, and in an early case in Wisconsin it was held: "Proof that the reputation of the house, or of its frequenters and the defendant was bad in that respect, is not *conclusive* of defendant's guilt." *State v. Brunell,* 29 Wis. 435. This case was cited with approval by this court in *Drake v. State,* 14 Neb. 535. This was a prosecution under section 210 of the criminal code; Rev. St. 1913, sec. 8783(208). In discussing the evidence nec-

essary to establish the charge, the court emphasized the fact that the evidence was that the house was not used for any other purpose. "No family lived in it." In a note under *Beard v. State,* 4 L. R. A. 675, it is said that "general reputation is not sufficient evidence," and many authorities are cited as supporting that proposition. Other authorities are cited as holding that the character of the house may be proved by common reputation, but in such case "the proof must directly implicate the person charged with keeping it." The title of the act reminds us that it is houses of lewdness, assignation and prostitution that are to be dealt with, and in determining the character of the house in question it is of great, if not controlling, importance to inquire whether it is principally devoted to a legitimate purpose.

The object of the statute is to provide an efficient and prompt means for suppressing the so-called "red light district" in communities that are unwilling to tolerate such a nuisance. The statute is not intended as a means of regulating the morals of private individuals, nor to prevent immorality in hotels, mainly devoted to the accommodation of families and moral, well-behaved people. Of course, if a hotel becomes "a house of lewdness, assignation and prostitution," it will not escape the ban of the statute because some innocent people are deceived and patronize the house in good faith as a hotel. It is not necessary to prove that the owner of the property knew that it was being used for the prohibited purposes; if the proprietor, that is, the person in control and management of the house, has such knowledge it is sufficient.

The general character of the evidence is stated in our former opinion (96 Neb. 123) and it was there said: "The evidence as to the hotel having an evil reputation was conflicting. * * * Whatever the actual fact may be, the testimony in the record upon this point, standing alone, would not justify an order declaring the hotel to be a nuisance." It might be further suggested that much of the evidence intended to show the reputation of the house is indefinite, and some of it incompetent. The witnesses were

not always confined to general reputation, but were allowed to state their belief and how they individually regarded the use of the hotel. The evidence of "paid decoys or informers," referred to in our former opinion, related mostly to the doings of vile persons sent to the hotel for that purpose, after this action was begun. The statute is a wholesome one. It ought to be liberally construed to enable virtuous communities to protect themselves against public places kept for lewd purposes. It may be that the authorities of Omaha have begun with the most shameless bawdy house within that city, but the evidence taken at the trial does not convince us that such is the fact. If this hotel is devoted to such purposes, that is, if it is a house of lewdness, assignation, or prostitution, the prosecutor will undoubtedly be able to establish that fact.

Our former decision is therefore set aside, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J. I dissent from the order setting aside our former decision. I think it should in all respects be adhered to.

ROSE, J., not sitting.

W. F. H. ARMSTRONG, TRUSTEE, ET AL., APPELLEES, V. DAVID C. PATTERSON, APPELLANT.*

FILED NOVEMBER 12, 1914. No. 17,384.

1. **Limitation of Actions:** QUESTION FOR COURT. When the pleadings show, without dispute, the time that has elapsed since the cause of action accrued, the question whether the action is barred by the statute of limitations is a question of law for the court.

2. **Judgment:** ACTION ON JUDGMENT. When the federal court for this district has rendered a judgment for deficiency in an action of foreclosure of a real estate mortgage, an action upon such judg-

*Reversed on rehearing, see opinion, p. ——, *post*.

ment may be maintained in the courts of this state without first obtaining leave to bring such action.

3. ———: ———: LIMITATIONS. The statute of limitations does not apply to actions upon domestic judgments.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

David C. Patterson, pro se.

William Baird & Sons, contra.

A. S. Churchill, amicus curiæ.

SEDGWICK, J.

This plaintiff obtained a deficiency judgment against the defendant in the circuit court of the United States for this district in June, 1897, and in July, 1911, he brought this action upon that judgment in the district court for Douglas county. He alleged in his petition the foreclosure of the mortgage and sale of the property and the deficiency judgment. The defendant answered, admitting the judgment as pleaded, and alleged the statute of limitations, and that no permission had been given by the court in which the judgment was rendered to bring an action thereon. No reply was filed, and upon plaintiff's motion the court entered a judgment in his favor upon the pleadings. The defendant has appealed.

These pleadings show that more than 14 years had elapsed after the entry of the judgment before the commencement of this action, and the allegation that no permission had been given by the court to bring an action upon the judgment not being denied, the question is also presented as to whether such permission is necessary.

1. Upon the first proposition the plaintiff relied upon *Snell v. Rue,* 72 Neb. 571, in which it was held: "The provisions of sections 10 and 16 of the code, known as the statute of limitations, do not apply to actions upon domestic judgments." The defendant attacks that decision as unsound. He points out that it is predicated largely upon *Tyler's Ex'rs v. Winslow,* 15 Ohio St. 364, and says

that that decision is wrong, and has since been discredited by the Ohio court. He also calls attention to *Stockwell v. Coleman,* 10 Ohio St. 33. It is true that in *Tyler's Ex'rs v. Winslow* it is held that a judgment of a court of that state is not a specialty, within the meaning of their statute, and that the decision is substantially placed upon that holding, and in *Stockwell v. Coleman* it was held that a foreign judgment is a specialty, which appears to be recognized by the Ohio court as inconsistent with the holding that a domestic judgment is not a specialty. In the later case the holding in the *Stockwell* case is limited, "so far as it conflicts with the holding that the domestic judgment is not a specialty." In *Todd v. Crumb,* 5 McLean (U. S.) 172, the circuit court of the United States decided that "the statute of limitations of Ohio does not bar an action on a judgment. A judgment is not an agreement, contract, or promise in writing, nor is it in a legal sense a specialty." The statute construed in that case was "that all actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract, or promise in writing, must be brought within fifteen years," which is, so far as this question is concerned, identical with ours, except that ours applies the limitations specifically to foreign judgments, and so tends to raise the presumption that it was not intended to include domestic judgments in the limitation. In *Fries v. Mack,* 33 Ohio St. 52, which was decided in 1877, the supreme court of that state appears to discredit the decision in *Tyler's Ex'rs v. Winslow, supra,* although it expressly refuses to overrule it. Speaking of that case and the case of *Stockwell v. Coleman, supra,* the court said: "The two cases may well stand together, although it must be conceded that the reasons upon which the latter decision (*Stockwell v. Coleman*) is placed by the judge delivering the opinion are not in harmony with the views expressed in the former case, and strongly tend to weaken its authority."

It is not entirely clear why the legislature should limit actions upon foreign judgments to five years, and limit proceedings to revive dormant domestic judgments to 10

years, and provide no limitation upon actions upon domestic judgments. It is to be expected that, when the attention of the legislature is called to this matter, there will be further legislation. The decision in *Snell v. Rue, supra,* was rendered more than 10 years ago. It is not wholly without reason to support it, and it has been emphatically approved by this court in an important action in which it was a vital question. *Young v. City of Broken Bow,* 94 Neb. 470. In the opinion in that case the court said: "One of the defenses interposed by the city is that all of the judgments are barred by the statute of limitations. Counsel for defendant abandons this contention in his brief, and concedes that under the authority of *Snell v. Rue,* 72 Neb. 571, this defense must fail." There have been five sessions of the legislature since the decision was pronounced, and in 1909 the statute providing for the revival of dormant judgments was amended so as to place an absolute limit upon such proceedings (laws 1909, ch. 154), and the legislature has not seen fit to establish any limitation for actions upon domestic judgments. To establish such a limitation now would be legislation, and is not within the province of the courts.

2. Section 8257, Rev. St. 1913, provides: "After such petition (for the foreclosure of a real estate mortgage) shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." We have seen that it is conceded that no such permission was granted by the court by which this deficiency judgment was rendered. It is insisted by the defendant that this permission is necessary after a deficiency judgment is rendered, as well as while the proceedings for foreclosure are pending, but in this we think that the defendant is wrong. A decree of foreclosure of the mortgage becomes a final decree when the sale thereon is confirmed, so that the statute contemplates two decrees, and the words in the statute, "after a decree is rendered thereon," must be construed to mean the decree of foreclosure, rendered

on the mortgage. When we consider the purpose of the statute requiring the permission of the court in which the action is pending, this construction of the statute becomes necessary. Section 8259 requires the plaintiff in foreclosure to allege and prove that no proceeding at law has been had to recover the debt, or if such proceeding is had it must be finally determined and disposed of before an action for foreclosure can be sustained. These two sections of the statute, construed together, are plainly intended to protect the defendant against the pendency of two actions at the same time, one for the foreclosure and the other for the recovery of the debt. The reason of these provisions has no application whatever to a deficiency judgment. After the decree on the foreclosure proceedings until the sale is made and confirmed by the court, the defendant is protected against any action in another court for the recovery of the debt. The judgment for a deficiency is a final and independent judgment upon the debt itself, and when such judgment is entered all questions in regard to the indebtedness are settled and the defendant is no longer in litigation in regard thereto.

3. It appears that the plaintiff applied to the United States court to revive the deficiency judgment, but afterwards dismissed that application, and it cannot therefore affect the question presented here.

The judgment of the district court is in harmony with the views above expressed, and is therefore

AFFIRMED.

FAWCETT, J., not sitting.

PETER L. WEBER, APPELLEE, V. WILBER W. TOWLE, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,885.

1. **Chattel Mortgages: BILL OF SALE: EVIDENCE.** A bill of sale, although purporting on its face to convey the property absolutely, may be shown to have been given as security only.

2. ———: ———: ———. When the maker of the bill of sale is indebted at the time, and such indebtedness forms the consideration for the contract, it is important to know whether the indebtedness was canceled and the evidence thereof surrendered when the bill of sale was made.

3. ———: ———: QUESTION FOR JURY. If, however, the value of the property is much greater than the amount of indebtedness so surrendered, and the proof is clear and satisfactory that the bill of sale was induced by promises to allow the maker thereof to redeem by paying the amount of the indebtedness and interest thereon, it is for the jury to find, in the light of the circumstances of the transaction, whether the transaction was an absolute sale or security only.

4. **Appeal:** CONFLICTING EVIDENCE. When the evidence as to the value of the property, and upon the general issue tendered, is substantially conflicting, the verdict of the jury will not be disturbed as unsupported, unless, upon the whole record, it is clearly wrong.

5. ———: INSTRUCTIONS: ISSUES. The trial court should, as far as practicable, simplify the issues in instructions to the jury, but if the parties concur in the method of trial, and the jury is instructed in harmony therewith, and the instructions contain no erroneous statement of law prejudicial to the party complaining, the judgment will not be reversed upon appeal because matters are submitted to the jury which were actually tried by the parties, but which should have been eliminated from the case if either party had desired.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

George A. Adams, for appellant.

A. F. Moore, Tibbets, Anderson & Baylor and *Holmes & DeLacy, contra.*

SEDGWICK, J.

In November, 1911, this plaintiff appears to have been conducting a cabinet business on O street, in the city of Lincoln. He had some machinery, tools, a little lumber, some mantels, and other stock. This property was mortgaged in the sum of $490. The mortgage was past due, and the plaintiff had waived publication of notice of foreclosure, and the mortgagees were insisting upon a sale of

the property. The defendant Deahl was interested as mortgagee, and the defendant Towle was acting as his attorney or adviser. They went to the plaintiff's place of business in the forenoon and insisted upon a sale of the property to pay the indebtedness. At the plaintiff's request the matter was continued until afternoon, when the defendants were again at the place of business, and the plaintiff executed to the defendant Towle a bill of sale of the property. Towle took possession of the property, and the keys to the room in which it was situated were turned over to him. Towle paid the mortgages on the property and turned them over with notes they secured to the plaintiff. He also gave the plaintiff receipts for certain claims which he held for collection against the plaintiff, and afterwards paid the rent for the room. A few days later the plaintiff offered to redeem the property by paying the amount which the defendant Towle had paid for the same, with interest at the rate of 10 per cent. from the time of the payment. This the defendant Towle refused, insisting that the transaction was an absolute sale to him. The plaintiff brought this action in the district court for Lancaster county to recover the value of the property, alleging that the defendant Towle had converted it to his own use, and that the defendant Deahl had assisted him in the conversion. Deahl was afterwards discharged from the case, and the jury found a verdict in favor of the plaintiff in the sum of $732. The court required the plaintiff to remit $232 from this verdict, which was done, and judgment entered against the defendant Towle in the sum of $500, from which he has appealed.

The principal question presented and argued in the brief is whether the transaction was an absolute sale or was merely a transfer of the title as security. Although the question was a simple one, the parties succeeded in putting in evidence covering something over 400 pages of typewritten matter, much of it immaterial, consisting of evidence of prior transactions, and of extensive cross-examination, more or less irrelevant. It has been frequently held in this and other states that a bill of sale of personal prop-

erty, although in form without any condition, may be shown by parol evidence to have been given as security only. When the maker of a bill of sale is indebted at the time, and such indebtedness forms the consideration for the contract, it is generally considered that it is very important to inquire whether the indebtedness was extinguished by the contract or was continued and existed concurrently with the bill of sale. In this case the defendant testified that, when he took the bill of sale, he surrendered the notes and mortgage to the plaintiff, and also gave him receipts in full for claims which he held against him for collection. From the plaintiff's evidence it appears that he had possession of the notes and mortgages at the time of the trial, and there is no suggestion in the briefs that the defendant's evidence upon this point is anywhere contradicted in this voluminous record. The plaintiff alleges that the defendant was to return him the property upon payment of $500, and did not allege, or even admit in his pleadings, that he agreed at the time to repay the defendant the full amount which was paid for the property and interest thereon.

From these and other circumstances that appear in the record, if the question had been submitted to us to determine the fact, we should probably have found that the transaction was an absolute sale, but it is the duty of the jury to determine the questions of fact, and, where there is a substantial conflict in the evidence, the finding of the jury upon such questions cannot be disturbed, unless, upon the whole record, it appears that it is clearly wrong.

The plaintiff testifies, and there were circumstances indicating that he was correct in testifying, that he was laboring under some compulsion when the bill of sale was made, and that, before agreeing to execute the bill of sale, he obtained from the defendant Towle a promise that, if he would execute the bill of sale, he would hold the property for 10 or 12 days, and would reconvey it to the plaintiff upon payment to him of the amount which he had advanced for the plaintiff. There was other evidence tending to corroborate the plaintiff in this, and, while it was contra-

dicted by the defendant and by some other evidence, we cannot say that the jury were so clearly wrong as to require that the verdict be set aside. If the value of the property was much greater at the time than the amount which the defendant paid out for the plaintiff, that fact would tend to corroborate the plaintiff's testimony upon this point. The evidence in regard to the value of the property was very conflicting, and it would be impossible to determine with any degree of accuracy its true value at the time the bill of sale was made. There was some evidence tending to show that the property was worth as much as $2,000, and it would not have been entirely beyond reason to have found its value to be $1,000, and perhaps more.

The defendant criticises some of the instructions given by the court. If the defendant had confined the investigation to the real issue of the character of the bill of sale, and had consistently insisted that the plaintiff's evidence be also so confined, the defendant would be in a better position to complain of these instructions. We have not found that the instructions misstate any abstract proposition of law, and the court, in submitting the question to the jury, followed substantially the theory of the parties as to the manner of trial. The defendant requested no instruction submitting the issue as he seems to insist now that it ought to have been submitted. When we consider the method of both parties at the trial, we cannot say that the court has unfairly submitted the issue. We have not found any error in the record, of which the defendant is in position now to complain, which requires a reversal.

The judgment of the district court is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

WILLIAM BOYD, JR., APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,800.

1. **Change of Venue.** "An application for a change of venue in a civil action should be denied, unless it is made to appear to the court that a fair and impartial trial cannot be had in the county where the action is pending; the fact that there are numerous persons in the county that are biased and prejudiced against a party to a suit will not justify a court in granting a change of venue, on the application of such party, if it appears that a fair and impartial jury can be had, and a fair trial had therein." *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42.
2. ———: APPEAL: DISCRETION OF COURT. "Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue." *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835.
3. ———: ———: ———. "In passing on a motion for a change of venue the district court is vested with a sound legal discretion, and his ruling thereon will not be disturbed unless it appears that he has been guilty of an abuse of such discretion." *Smith v. Coon*, 89 Neb. 776.
4. **Trial:** QUESTIONS FOR JURY: DIRECTING VERDICT. In jury trials all questions of fact upon conflicting and material evidence must be submitted to and decided by the trial jury. In such case, the trial court has no authority to withdraw such evidence from the jury and direct the return of a verdict in favor of either party.
5. **Case Distinguished.** This case distinguished from *Albers v. Chicago, B. & Q. R. Co.*, 95 Neb. 506.
6. **Instructions** given and refused are examined, and no error requiring a reversal of the judgment is found.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Byron Clark, Jesse L. Root, Strode & Beghtol and *Barton L. Green*, for appellant.

A. G. Wolfenbarger and *George W. Berge, contra.*

REESE, C. J.

This is an action to recover damages alleged to have been sustained by the destruction of growing crops in the Middle creek valley on August 29, 1910, by reason of the same having been flooded with high water by which, it is alleged, plaintiff's crops were destroyed. It is alleged and contended by plaintiff that the proximate cause of the flooded condition of plaintiff's land and crops was the faulty construction of certain embankments thrown up by defendant in the building of its track yards in said valley, which changed the flow of the surface water in flood times from its former habit of spreading out over the valley to and confining it to the south side of said embankments, thereby greatly increasing the flow upon that side to the extent of overflowing plaintiff's land, which is upon the south side, and destroying his crops thereon, as aforesaid. The amount claimed in the petition was $1,000. A jury trial was had, which resulted in a verdict in favor of plaintiff for the sum of $500. A motion for a new trial was filed and overruled, when judgment was entered upon the verdict. Defendant appeals.

The first question for consideration is the ruling of the district court on a motion for a change of venue filed by defendant in the case of William Albers against this defendant, *Albers v. Chicago, B. & Q. R. Co.*, 95 Neb. 506, but which by stipulation of the parties was considered on the hearing of this case. As shown by the opinion in the *Albers* case, the motion was supported by the affidavits of 113 persons, and opposed by the affidavits of 250 persons. It is stated in plaintiff's brief that there were about 140 affidavits supporting the change and 245 affidavits in opposition thereto. Whether the affidavits presented on the hearing in this case are the same in number as in that case we have no means of knowing, except as is furnished by the stipulation and the acts of the parties, but we will assume that they are substantially the same, some additional affidavits having, probably, been filed after the hearing of the *Albers* case. It is said in defendant's brief that "the showing made by the defendant and by the respective

plaintiffs in all of the cases is identical." It is quite probable that this is substantially correct, although the number of affidavits filed by defendant was 113, instead of 140 as stated by plaintiff. Upon the first consideration of this part of the case, we were strongly inclined to adopt defendant's view that "the instant case, therefore, is ruled by the decision in the cited case (*Albers v. Chicago, B. & Q. R. Co.*, 95 Neb. 506), and the appellant's right to a judgment of reversal, with a direction to grant a change of venue, is absolute." But, upon reflection, and in view of the apparent confusion as to the affidavits, and the further fact that that case was not connected with this one, the parties plaintiff being different persons, the property in dispute being entirely different, and the averments and evidence referring to different property, one separated from the other a considerable distance and upon a different stream, and the alleged construction of defendant's improvements being different from that attacked in the *Albers* case, and the further fact that the damage alleged in this case is said to arise from an overflow in 1910, and in that case in 1908, we have concluded that the question requires an independent investigation, but not forgetting to give due and respectful consideration to the holding in that case, by a majority of the court, to the effect that there was an abuse of discretion on the part of the district court in overruling the defendant's motion for a change of venue in that case.

In defendant's brief much stress is placed upon the affidavit of one Gottfreid Herzog. We have examined his affidavit with care for the purpose of determining the weight to which it is entitled upon this question in this case. The affidavit is quite long, and cannot be set out here in full. It is largely composed of the conclusions of the affiant, instead of the statements of fact within his knowledge, and of matters which do not throw any light upon the views of the people of Lancaster county with reference to this particular suit. He says that continuously since the flood of July, 1908, it has been the topic of conversation among those owners, friends and lawyers in the

city of Lincoln and county of Lancaster, and affiant has repeatedly heard conversations between the owners and claimants when they were alone and also when their attorneys or agents were present, and it was a matter of frequent comment and argument that juries of the county would find for the claimants and that the railway company could not win; that meetings have been held in said neighborhoods by numbers of said owners, aggregating as many as 200 at one time and other times 75 or 50, and in those meetings the question of defendant's liability was discussed, and property owners would agree to testify for each other in their claims for damages and suits, and written memoranda would be made as to what each one would testify to for the other, and those meetings are regularly held upon the last Tuesday of each month, and sometimes special meetings are called at other dates; that affiant is informed that at one meeting a lawyer was present and talked to the claimants and told them why they should commence suits; that he does not remember the name of the lawyer, but heard several property owners discuss the matter afterward; that the 400 owners having claims in the salt basin are scattered over a territory covering 60 blocks in the city of Lincoln and its additions; that at the time of the flood affiant read descriptions in the newspapers published in Lincoln detailing the flood and the loss of property and life and the accompanying exciting events; that affiant was a witness in one of the cases tried. A consideration of this part of the affidavit must satisfy any fair-minded person that, if true, it could have no possible bearing upon the question of the mental attitude of the public in Lancaster county so far as this particular case is concerned, for it must be observed that practically all he says has reference to the flood in 1908, two years before plaintiff's alleged cause of action arose, and with reference to conditions in the salt basin, far removed from plaintiff's land. That there was a disastrous flood in the salt basin in 1908 all admit. As bearing upon the matter of bias and prejudice in the minds of the people of the county,

he says that he is well acquainted with men living in the county outside of the city of Lincoln, and has heard 10 or 15 different parties say that they thought that the railroad company should pay and ought to pay the claims for damages, referring to the salt basin flood of 1908; that from numerous conversations he has heard between different men, both in the city of Lincoln and out over the county, there is a general prevailing prejudice against the railroad company on account of the flood damages, and that he does not believe that the railroad company can have a fair and impartial trial before an unprejudiced jury in Lancaster county. Other parts of the affidavit are of like tenor. He closes the affidavit by saying that "he has no personal interest in the subject matter at this time, nor has he had any such personal interest since about four months ago," which is at least suggestive, but this has no reference as to the case now in hand. He gives his business as that of a carpenter, his age 44 years, that he has resided in Lincoln about seven years, and now resides on what is known as the "salt basin," where he has resided for six years. Even were the subject of the meetings of the complainants a material matter upon the question of the change of venue in the *Albers* case, he gives no hint that he attended or was present at any of them. An unusual feature of his action in this case is shown by the affidavit of one Weingarten, who testifies that he presented to Herzog an affidavit for signature that 26 persons who made affidavits in resistance to the motion for the change of venue were interested in claims growing out of the flood of 1908, a part of which had sued and others threatening suit, when he declined to sign the affidavit "for fear they would kill him." Without further attention to the affidavit of this person, we are persuaded that the district court rightfully cast it aside, having little, if any, application to this case, and as of no probative value therein. It is no evidence of local bias or prejudice in this case that the parties having similar causes of action, based upon facts entirely different from this case, should meet and confer together in their preparation for trial.

Many affidavits were filed descriptive of the floods of 1907-1908 in the salt basin, and some of that of 1910, showing the curiosity of the people of Lincoln, to the extent that the viaduct and shore of the water were thronged with people observing the same, in the salt basin; but there is a dearth of proof that there was any excitement or prejudice expressed against defendant with reference to this case. It is true that practically all of the 113 affidavits filed by defendant contain the statement of bias and prejudice, and the belief of the affiants as to the minds of the people of the county, and that defendant could not obtain a fair and impartial trial in the cases referred to therein; but much of the contents of those affidavits was not material upon the question of the proposed change of venue in this case. It may be possible that, taken alone and uncontradicted, there was sufficient to justify a change of the place of trial in this case; but when we consider the affidavits presented by plaintiff, bearing upon this case, in which many of the assertions of those presented by defendant were contradicted, we are well convinced that the case appealed to the judgment and discretion of the district court, and we cannot say that there was an abuse of that discretion in overruling this motion. If there is not an abuse of discretion, the order of the district court overruling the motion must be affirmed. The order overruling the motion was "without prejudice to a second application, provided, it should hereafter appear from trial in other actions or otherwise that defendant cannot have a fair trial in this county," to which defendant excepted; but we find no renewal of the motion in the transcript or bill of exceptions, except that before the jury were impaneled the defendant resubmitted to the court the former motion, which was overruled, no new facts or evidence being introduced.

In *Northeastern N. R. Co. v. Frazier,* 25 Neb. 42, we said in the syllabus: "An application for a change of venue in a civil case should be denied, unless it is made to appear to the court that a fair and impartial trial cannot be had in the county where the action is pending; the fact

that there are numerous persons in the county that are biased and prejudiced against a party to a suit will not justify a court in granting a change of venue, on the application of such party, if it appears that a fair and impartial jury can be had, and a fair trial had therein." In the body of the opinion we said: "In civil cases it is rare that the people of a whole county become biased and prejudiced against a party to an action. The reason is, they ordinarily take but little interest in the controversy, hence have no feeling in the case. There is a marked difference in this respect between a civil and criminal case, particularly where the offense charged is an atrocious one. * * * A plaintiff properly bringing an action in a county in which he resides is entitled to have the cause tried in such county, unless it is clear that a fair and impartial trial cannot be had therein."

In *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, we held: "Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue."

In *Smith v. Coon*, 89 Neb. 776, it was held in the syllabus: "In passing on a motion for a change of venue the district court is vested with a sound legal discretion, and his ruling thereon will not be disturbed unless it appears that he has been guilty of an abuse of such discretion." In the body of the opinion it is said: "It has been frequently held, where this question has been fairly submitted to and determined by the trial court, that, unless it clearly appears that there has been an abuse of discretion in refusing to grant a change of venue, the ruling of that court will not be disturbed. From a careful examination of the record in this case, we are of opinion that the order of the district court in refusing to grant a change of venue was the proper one. Finally, it appears that defendant had a fair and impartial trial; that his contentions were fully considered, and his matters of defense were submitted to the jury under proper instructions; that the evidence is amply sufficient to sustain the verdict; and the judgment of the district court is therefore affirmed."

The rule applicable to motions for change of venue is as strictly held in this state in criminal cases. *Jahnke v. State,* 68 Neb. 154; *Goldsberry v. State,* 66 Neb. 312; *Simmerman v. State,* 16 Neb. 615; *Sweet v. State,* 75 Neb. 263; *Taylor v. State,* 86 Neb. 795.

After a careful examination of the affidavits applicable to this case, submitted to the trial court, we are unable to detect any abuse of discretion on the part of the court in this case in overruling the motion under consideration.

Quoting from appellant's brief: "The instant case is one involving a charge of negligent construction in elevating the natural surface over a considerable area on the north side of Middle creek, by depositing earth, raising embankments, and constructing railway tracks thereon. No openings were made in this grade, which is from 200 to 1,000 feet in width and 3½ miles in length."

As bearing to some extent upon the question of the bias and prejudice of the jurors, we have examined the evidence as to the amount of plaintiff's loss, and find that the lowest average estimate of the witnesses exceeded the amount sued for. The verdict, being for $500, does not show any bias or prejudice on the part of the jury, and, so far as that feature of the case is concerned, defendant cannot claim that it did not "have a fair and impartial trial."

At the close of plaintiff's evidence, defendant moved the court for a peremptory instruction to the jury to return a verdict in favor of defendant. The motion was overruled, to which exception was taken. Again, after all the evidence was taken, the motion was renewed and overruled, with a like exception. Both rulings are now assigned for error. This requires a consideration of the evidence. The land upon which plaintiff's crops were growing is situated in the valley of Middle creek, principally on the south side of the creek bed. When in a state of nature the bed of the stream was quite crooked, and, except at times of unusually high water and floods, carried the stream within its banks. On occasion of excessive floods the water spread out more or less over the entire valley. The general direction of the stream is nearly east and west, its waters emptying into

Salt creek, which runs from south to north through the western part of the city of Lincoln, the streams meeting at nearly right angles, except that near the mouth of Middle creek its channel turned toward the northeast and its waters emptied into Salt creek farther down the stream within the city. A line of defendant's railroad was constructed within and along the Middle creek valley on the north side of the stream. In the years 1906, 1907, 1908, defendant constructed a system of car tracks along the north side of the stream, cutting it in places, filling up the bed, and making new channels along the south side of its tracks. The embankment upon which the tracks were placed was from 200 to 1,000 feet in width and 3½ miles in length, and located practically in the center of the valley. The land upon which plaintiff's crops grew is situated on the south side of this embankment, and it is alleged that by its construction the flood waters, which had formerly spread out over the whole width of the valley, were turned to and confined on the south side of the structure, and were thus forced onto and over plaintiff's crops, and by which they were largely destroyed. It is conceded that no openings were left in this whole embankment, and that when the flood waters were upon the south side thereof there was no escape therefrom but by passing down the whole distance to and through a newly cut channel into Salt creek just above a bridge across that stream, the new channel entering that creek at about right angles with its bed. It is contended by plaintiff, and testified to, that prior to the construction of the embankment when the stream was flooded and overflowed the water spread out over the whole width of the valley at small depth, and that by its escape into Salt creek valley to the northeast, as well as being held by certain depressions or ponds, the injury to the growing crops was not so serious, only a small part of the land being overflowed, but that by being confined and held upon the south side of the embankment its depth was greatly increased and the crops submerged and destroyed, and that at the time the crops were being destroyed in 1910 there was no water on the north side of the embank-

ment, except what was carried by the drainage from the hills and ravines on the north. Upon this there was a conflict in the evidence, as some testified that at the time of the flood in question there was a large body of water on the north side, and also that in the earlier times and before the construction of the embankment more water was on the south side of the creek, when floods came, than upon the north side. This conflict was submitted to the jury. There was sufficient to sustain the contention of plaintiff, if believed by the jury, and therefore their finding on that part of the case must be accepted as final. It is also true that the question of the negligent construction of the embankment, the changing of the channel of the stream, the impounding of the water, confining it to the south side of the valley, if it was so confined, the failure to make openings through the embankment for so long a distance and thus allowing the flood water to escape to the northeast, but preventing the same, as claimed by plaintiff, if the former floods did so escape, would necessarily require the decision of the questions of defendant's negligence by the jury. There is no contention that plaintiff's crops, some of which were practically matured, were not injured and a large part thereof totally destroyed by the flood waters. Neither is there any contention that, if defendant is liable at all, the verdict is excessive. The refusal of the trial court to direct the jury to return a verdict in favor of defendant is strongly urged by counsel for defendant as being erroneous. When we consider the whole case, with conflicts in the evidence, we are persuaded that the court did not err in declining to give the peremptory instruction to the jury directing a verdict in favor of defendant. In effect it would have been the withdrawal of all contested material facts from consideration by the jury, and the assumption of a decision thereon by the court, which, under our system of judicial practice, can never be allowed.

It is contended that "the court erred in refusing to permit the defendant to prove, on the plaintiff's cross-examination and that of his witness Harris, that in 1909 and

1910 the conditions in Middle creek valley were such that the plaintiff should have in reason anticipated a flood of the character he encountered in 1910." The argument is that the improvements made by defendant are permanent in their character; that they were not unnecessary when considered from a railroad standpoint, or that from an engineering standpoint they could have been constructed other than they were and at the same time provide a safe way for the use of the railroad company and its patrons; and it is claimed that under the rule stated in *Harris v. Lincoln & N. W. R. Co.*, 91 Neb. 755, defendant could not be held liable for the subsequent destruction of crops because the existence of the railway embankments deflected the flood waters over and upon the premises; that defendant was entitled to prove by plaintiff on his cross-examination that he knew before planting his crops that they were liable to be destroyed by high water; that, if plaintiff is entitled to recover at all, his measure of damages would be "the difference between the rental value of the property with the defendant's improvements in the shape they are in and its value if no such improvements existed. In other words, the plaintiff cannot gamble upon the chance he takes by renting the land at a depreciated rental so that he will profit largely should the floods not come, and, on the other hand, attempt to hold the railroad company for the damage such floods will work in the event they appear." The case of *Willitts v. Chicago, B. & K. C. R. Co.*, 88 Ia. 281, is cited in supporting this contention. In that case it was stated that, if "it was fully evident to the plaintiff at any time that it was useless to plant any crop * * * because it was certain to be flooded and destroyed," then the value of the crop was not an element in estimating damages. This might be the correct rule when it is *plainly useless* to plant the crop *"certain to be flooded and destroyed,"* but that is not the case in hand. Other crops had been raised upon this land, and there was no *certainty* that such a flood might ever return. No one can say that it is "certain" that such a flood will return during this or any subsequent year. Such a ques-

tion would be beyond the power of any finite mind to determine. Should an action be brought for "rental value" and it appear that there was no flood, as will probably often be the case, the defense that, had plaintiff planted and cultivated his crop, he could not recover, would have to be sustained. If the oft-repeated rules that one must so use his property as to inflict as little damage upon his neighbor as may be, and that the neighbor should so utilize his own as to reduce the injury, are to be applied, the contention on this part of the case cannot avail. In this view the court did not err in refusing to give the ninth instruction asked by defendant that, "if the plaintiff *knew* before he leased the land" that it would be overflowed, so as to destroy the crop, he could not recover. It must be sufficient to say that there was no proof that he "knew," nor could any one know what the future might produce.

Other criticisms are made upon the action of the court in refusing to give, as well as in giving, instructions, but we are persuaded that so far as the instructions go, whether given or refused, the case was fairly submitted to the jury, and we can discover no prejudicial errors occurring during the trial.

The judgment of the district court is therefore

AFFIRMED.

ROSE and FAWCETT, JJ., not sitting.

SEDGWICK, J., dissenting.

If this action was pending when the circumstances stated in Herzog's affidavit occurred, and parties interested in this case were present at the conferences therein described, I think the opinion in this case does not satisfactorily distinguish between this case and the *Albers* case on the question of change of venue. If the land in question in this case adjoins the land mentioned in *Harris v. Lincoln & N. W. R. Co.*, 91 Neb. 755, and is no higher, I think that this opinion does not satisfactorily distinguish between this case and the *Harris* case on the question of defendant's liability. For these reasons, I do not concur in this opinion.

FRANCIS THOMAS DORE, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,830.

1. **Trial:** VERDICT. The verdict of a jury finding generally in favor of a party to the suit is equivalent to a finding in favor of such party upon all the issues and evidence submitted to them.
2. **Carriers:** CHILDREN AS PASSENGERS: CARE REQUIRED. A street railway company is a common carrier of passengers and is subject to the rules of law governing such carriers. The degree of care and responsibility is greater when transporting children of tender years than when transporting adults and persons capable of caring for themselves.
3. **Appeal:** EVIDENCE: FUNCTION OF JURY. The jury are the judges of the credibility of witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested.
4. **Carriers:** INJURY TO PASSENGER: NEGLIGENCE: QUESTION FOR JURY. It cannot be said to be negligence, as matter of law, for a child of the age of seven years, after the giving of the signal for a street car to stop at the next street crossing, to leave his seat as the car approaches the desired crossing and stand in the doorway preparatory to leaving the car, when the car should stop at the indicated point for stopping.
5. **Damages:** PERSONAL INJURIES: EVIDENCE. It is not error for the court to permit the parents of an injured child to describe his sufferings, while confined to his bed, the length of time he was sick, and his habits and conduct before and after the injury, which might throw light upon the permanence and duration of the effects of such injury.
6. **Trial:** INSTRUCTIONS: CONSTRUCTION. In considering and construing instructions given by the court to a trial jury, the whole of the instructions given should be considered together.
7. **Damages.** The verdict for $1,500 *held*, under the evidence, not to be excessive.
8. **Trial:** INSTRUCTIONS. Instructions to the jury asked and refused are examined, some of which correctly state the law, but which were included by the court in those given upon its own motion. Those not given were properly refused.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell,* for appellant.

Arthur H. Murdock and *Arthur C. Pancoast, contra.*

REESE, C. J.

This is an action for personal injuries. Plaintiff being an infant sues by his next friend, John J. Dore. The uncontested facts are that on or about December 31, 1908, at the hour of about 4 o'clock in the afternoon, the plaintiff, a boy seven years of age, with his sister, a girl nine years of age, boarded a street car of defendant at Twenty-fourth and N streets, in South Omaha, to ride north to F street, in the vicinity of their home. They paid their fare and took seats near the rear door of the car. By some means the boy fell or was thrown from the car to the street, and received the injuries of which he complains. The street car was stopped. The conductor, with the help of others, picked up the boy and carried him into a nearby saloon. The girl started at once to notify their mother, and returned with her but met a physician and others taking the boy home, where he was placed on a bed, and the family physician sent for, who appeared in a very short time and ministered to plaintiff. The foregoing facts are substantially alleged in the petition, with the further averments that, after the children had proceeded to and passed G street and were approaching F street, the point of their destination, the sister arose from her seat, signaled and notified the conductor, who was in the forward part of the car, of their desire to disembark at F street, which they were approaching, but that the conductor paid no attention to said signal and notification and failed and refused to stop the car at the usual and proper place after crossing F street; that, as they came near the stopping place of the car, plaintiff left his seat, walking to the door, which he opened, and stood in the doorway preparatory to alighting from the car; that the conductor "recklessly, negligently and carelessly disregarded the safety of

said infant, Francis Thomas Dore, well knowing that said infant was standing in the rear of said car and was desirous of alighting therefrom at F street, refused and neglected to signal the car to stop, and when said car arrived at F street the employee of defendant herein, unmindful of the safety of said child, Francis Thomas Dore, negligently applied greater power to said car, thereby causing the car to give a sudden lurch forward, and by reason thereof the said Francis Thomas Dore lost his hold of the car as he was standing in the doorway of the car and was thrown violently out of said car, striking the guard-rail thereof, and onto the pavement of the street," receiving great and lasting injuries. Negligence is alleged in the failure to stop the car and in failing to exercise any care for the protection of said child. The negligence of the motorman is alleged by reason of his act in greatly increasing the power causing the car to give a great lurch, whereby plaintiff was injured by being thrown upon the pavement of the street striking his head and side, causing concussion of the brain, as well as internal injuries; that the injuries received are permanent; that before receiving them plaintiff was a strong, healthy and intelligent child, but that by reason thereof his health has greatly declined, and he has suffered both physically and mentally to his great and permanent damage, to the extent of $15,000, for which judgment was demanded.

The answer of defendant contains a number of specific denials, among which are that the sister notified the conductor that she and plaintiff desired to alight from the car at F street, that the conductor neglected plaintiff in any way, that he refused or neglected to signal the car to stop at F street, that the car gave a sudden jerk forward, and that by reason of any jerking of the car plaintiff was thrown out of the car and injured. The answer set up the facts of the entry and passage of the children on the car substantially as above stated; alleged that they appeared familiar with riding on street cars; that there was nothing in their conduct or appearance to indicate that they would attempt to leave the car while in motion; that with-

out any notice or warning given to the conductor, who was then engaged with other passengers, plaintiff suddenly left his seat in the car, went out onto the platform, and, while the car was in motion at its usual rate of speed, wilfully and knowingly stepped from the car to the pavement; that the accident was the result of the wilful act of plaintiff in leaving his seat and stepping from the moving car. There is also a general denial of the averments of the petition. The reply is a general denial of the allegations of the answer. There was a jury trial, which resulted in a verdict in favor of plaintiff for $1,500. A motion for new trial was filed, overruled, and judgment rendered on the verdict. Defendant appeals.

As is usual in such cases, there was a sharp conflict in the evidence bearing upon the facts of the cause of the accident. The plaintiff's evidence depended largely upon the testimony of the little girl and that of a lady who sat near them in the car, and upon the testimony of others, which in some degree, though slight, tended to corroborate certain portions of their evidence. As is well understood, these questions of conflict are solely for the consideration of the jury, and, where there is sufficient to sustain the verdict, it cannot be reviewed by the courts. There was sufficient, if believed by the jury, to sustain a finding that the ages of the children were as stated; that they boarded the car at Twenty-fourth and N streets, paid their fare, and were seated in the car near the rear door without any inquiry by the conductor as to their destination or where they desired to leave the car; that as the car approached F street, after passing G street, they both arose in their places, and the girl signaled to the conductor to stop the car at F street; that the conductor was looking at her at the time, but failed to signal to the motorman to stop the car; that, as the car approached F street, plaintiff went to the door, opened it, and was standing in the doorway, holding to the sides of the doorway, apparently waiting for the car to stop in order that he might leave it; that while he was thus standing, by a sudden increase of power, or otherwise, the car gave a lurch or jerk, by

which plaintiff was thrown to the rear platform, striking his head against an iron guard-rail, and thrown from the car upon the pavement, striking upon his head and side, by which, it seems, he was rendered unconscious and helpless; that the car was stopped after running a short distance, when the conductor went back to where he was lying, and, with the assistance of others, picked him up, carried him into a nearby saloon, where the conductor left him in charge of others and proceeded on his way with the car; that the child was assisted to his home, where he complained of his head and the soreness of his body, was at times delirious, was for a long time confined to his bed and room; that since his apparent and partial recovery he has lost in weight and mental power, and has never entirely recovered from the effects of the accident.

It was assigned in the motion for a new trial that the amount of the verdict was excessive. We cannot so conclude. Assuming, as we must, that the facts found by the jury are correct, we are unable to see that the verdict could have, rightfully, been for less.

The brief of appellant is exhaustive, and many cases are cited with extracts from the holdings of the various courts. The particular point to which those cases are cited is to the effect that a jerk or lurch of the car is not of itself evidence of negligence. The most, if not all, of the cases refer to the ordinary passenger being thrown from a car by reason of the jerk or jolt. Some of those cases seem to have been ignored by this court with refusal to follow them. *Omaha Street R. Co. v. Loehneisen,* 40 Neb. 37; *Stewart v. Omaha & C. B. Street R. Co.,* 83 Neb. 97. But, were such not the case, the rule of the cases cited could not be applied here. If the verdict of the jury is the equivalent to finding that the story stated by the little girl is true, which it must be conceded is the case, there is nothing upon which to found a contention that plaintiff was guilty of contributory negligence, even if the law would permit such a finding against one of his age, which is quite doubtful. *Richardson v. Nelson,* 221 Ill. 254; *Chicago City R. Co. v. Tuohy,* 196 Ill. 410; *Walbridge v. Schuylkill E. R.*

Co., 190 Pa. St. 274; *Rolin v. Tobacco Co.*, 141 N. Car. 300; *Huff v. Ames*, 16 Neb. 139; *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657; *Love v. Detroit, J. & C. R. Co.*, 170 Mich. 1. The strict rules of contributory negligence cannot be applied to a child of the age of plaintiff at that time. The facts necessarily found by the jury fail to show any negligence on his part, even could his age not excuse or exempt him from that charge.

It is insisted that the little girl's testimony was not entitled to belief, because unreasonable. That question was for the jury. They saw her upon the witness-stand, heard her testimony, and were impressed with the truth of her statements.

It is also claimed that the mere fact of the lurching or jerking of the car is no proof of negligence on the part of defendant. This, however, is not the whole case. The children boarded the car, rode to their destination, signaled the conductor, while standing, that they desired to alight. He looked at them, therefore saw them, but made no effort to stop the car. Defendant is a common carrier of passengers, and is under all the obligations of such carriers. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672. When the conductor was notified to stop the car at F street, it was his duty to do so and to see that the children safely alighted therefrom. This was a failure of duty, a want of care, therefore negligence.

Objection is made to the ruling of the court in permitting the parents of plaintiff to testify to his condition before and after the accident, on the ground that no sufficient foundation was laid for such testimony. The physician had testified that he saw the boy in bed, bruises on his head, seemed numb and dazed and like he was suffering some pain, that there was a stiffness, and the bumps and bruises were on the back of his head and along his back; saw him the next day, he was still sore and stiff all over, complained of quite a lot of pain, still dazed, still kind of smoky. The parents knew the boy, had watched over him from his birth, before and and after the accident. It would seem that there was foundation sufficient to en-

able them to testify as to his mental and physical condition before the accident and the change therein thereafter. His mother testified that, after the doctor made the examination and bandaged his head, the boy lay upon the bed moaning until he went out of his head; was out of his head until the next morning, and was down sick for three months. The evidence of these witnesses was not so much their opinions or conclusions, as the statements of facts, which they observed. We can find no error in the ruling of the court upon this subject.

The trial court gave 12 instructions to the jury upon his own motion, 3 asked by defendant, and refused to give 19 of the 22 asked by defendant. Some of the instructions given to the jury are sharply criticised by defendant. We have carefully examined all the instructions given the jury, and are satisfied that the objections are more technical than otherwise. The sixth instruction is as follows: "You are instructed that the defendant is what is known in law as a common carrier for hire, and it is the duty of defendant to use the greatest amount of human care and skill consistent with the operation of its cars to prevent injury to its passengers while they are being transported from one part of their system to another. It is also the duty of defendant to use greater care and caution in transporting passengers of tender age than when carrying adults or passengers of mature years; but in this case there is no presumption of negligence from the mere fact that said Francis Thomas Dore was a passenger and received an injury while being carried on the cars of said defendant." It is true that the language used, in the comparison of the duties of a common carrier of adult passengers and children of tender age, is to some extent a little extravagant; but, when considered in connection with other instructions, the ground for just criticism largely vanishes, and no prejudice could result.

Finding no error requiring a reversal of the judgment of the district court, it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

HENRY OWINGS, APPELLLEE, V. FIRST NATIONAL BANK, APPELLEE; HENRY SCHMIDT ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,838.

Deeds: DELIVERY. Plaintiff's wife was the owner of a certain tract of land near Johnson, in Nemaha county. She was taken sick with an incurable disease at Sterling, Colorado. During her illness, and something over a month before she died, she gave to her husband a deed to the land, executed about six months before that time, with written instructions to deposit it in a local bank, and upon her decease to have it recorded. She never countermanded the instructions. After her decease, plaintiff received the deed from the bank and recorded it. *Held* a sufficient delivery to pass title to him.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

E. A. Wunder, F. G. Hawxby and *John C. Hartigan,* for appellants.

Quackenbush & Neal and *Kelligar & Ferneau, contra.*

REESE, C. J.

This is an action brought by plaintiff, Henry Owings, against the First National Bank of Johnson, Nebraska, to recover the sum of $5,129.67, the proceeds of the sale of a tract of land, described in the pleadings, but the description of which need not be stated here. The land was formerly owned by Lizzie E. Schmidt, who was later married to Henry Owings. They went to the state of Colorado, and after their marriage there located in the city of Sterling, in that state. Mrs. Owings' health failed, and it became apparent that she was in a precarious condition. On the 28th day of June, 1911, Mrs. Owings executed a warranty deed to her husband, conveying the land in question to him, and placed it in a trunk in the house, and kept it until the 2d day of December, of the same year. At that time it was apparent that she could not recover, and that

the date of her dissolution was not far distant, her malady being consumption. She was confined to her bed, and called for the deed to be brought to her. She then obtained pencil and paper and wrote the following instructions: "Sterling, Colorado, Dec. 2, 1911. In case of my death, give this deed to my husband, Henry Owings, to be recorded so my property is his. I am in poor health and no hopes of ever getting well. He is the only provider I have got. Mrs. Lizzie Owings, Sterling, Colo." She handed the deed and the above described memorandum to her husband, requesting him to place them in a local bank at Sterling, which he did. Mrs. Owings died on the 7th day of January, 1912. The second day after her death, plaintiff called at the bank and received the deed and memorandum of instructions, above copied, as well as some money on deposit, and made preparations for returning to Johnson, Nebraska, with the remains of his deceased wife. Prior to her decease, she, with her husband, had negotiated the sale of the land to one J. George Hahn for the sum of $5,640, and on the 11th day of December, 1911, with plaintiff, executed a warranty deed to the purchaser, which was deposited in the First National Bank of Johnson, in this state. Prior to this time, and on the 2d day of December, 1911, a written contract of sale was made with Hahn for the sale of the land at the price of $5,640, $400 of which was paid in cash, the remainder to be paid on the 1st day of March, 1912, or $2,500 to be then paid, and the remainder on time at the option of the purchaser. Instead of accepting the time option, Hahn paid into the bank the whole amount, and accepted the deed, with another one executed by plaintiff.

Mrs. Owings left no child, nor father, nor mother, surviving her, but she had two brothers, Henry Schmidt and Charles J. Schmidt, who demanded one-half of the money in the bank as the heirs of Mrs. Owings. The bank refused to pay the money to either claimant, when this action was brought against it by plaintiff for the whole amount. The bank filed the statutory affidavit to the effect that it held no claim on the money, but that it was

demanded by the claimants, and asked to be protected. The court ordered the brothers to intervene and set up their claims by a day fixed by the court, which they did, contending that the deed from Mrs. Owings to her husband did not convey any title to him for want of delivery; that the sale of the land to Hahn was of her property, and by reason of their relationship to her they were entitled to one-half of the fund under the provisions of the statutes of descent in this state. It appears that Henry Schmidt held a note against his sister, Mrs. Owings, for the sum of $1,019.25, growing out of the settlement and adjustment of an estate to which the land formerly belonged, and which note Mrs. Owings directed should be paid at the time she handed the deed to plaintiff at Sterling. There is no question as to this sum of money, plaintiff having agreed at the trial that Henry Schmidt should receive it out of the fund. The cause was tried to the court without the intervention of a jury, when a finding and judgment was entered, giving the $1,019.25 to Henry Schmidt, and the residue to be paid by the bank to plaintiff. Defendants, interveners, appeal.

The real, and indeed the only, question presented is: Was the deed from Mrs. Owings to plaintiff so delivered to him as to pass the title? The negotiations for the sale to Hahn had so far progressed that the contract of sale to the purchaser was signed on the day the deed was handed to plaintiff for deposit in the Sterling bank, but the contract and conveyance to Hahn were both signed by Mrs. and Mr. Owings. Considerable testimony was taken at the trial showing what occurred at the time the deed was sent to the Sterling bank, as well as declarations made to others by Mrs. Owings after the execution of the deed and before the 2d day of December, the day it was sent to the bank. The written memorandum was made by Mrs. Owings while on her sickbed, and she never was "down town" after that date and prior to her death. She never made any effort to countermand those instructions, but, so far as is shown by the record, she was at all times thereafter entirely pleased with what she had done. Had

she been able to go to the bank and deposit the deed with oral instructions as written, the case would fall within the rule of *Roepke v. Nutzmann,* 95 Neb. 589, and we are unable to see why, under her written instructions to the bank, they would not be of equal force. That case and *Brown v. Westerfield,* 47 Neb. 399, are decisive of this one, and it is not necessary that the law of those cases be further examined. We are satisfied therewith, and that the judgment of the district court is right and it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JACOB HERTER ET AL., APPELLEES, V. LOUISE HERTER ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,847.

1. **Courts:** COUNTY COURTS: JUDGMENT: PRESUMPTION. "In probate proceedings the county court is a court of record and of exclusive original jurisdiction, and in such actions its judgments and the recitals therein are entitled to the presumptions that attach to the records of other courts of that character." *Kolterman v. Chilvers,* 82 Neb. 216.
2. **Wills:** CONSTRUCTION. The object and purpose of a court in construing a will is to carry out and enforce the intention of the testator, as shown by the language of the will, and considering the circumstances under which it was made.
3. ———: ———. The use of the word "comp," occurring in the later clause of the will, is *held* to mean "company" and to include all the heirs of the testator.
4. ———: ———: DISINHERITANCE. Heirs will not be disinherited by conjecture, but only by express words or necessary implication and the actual disposition of the estate to another person.
5. ———: ———: PRESUMPTION. In the absence of anything in a will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed with directions.*

John M. Stewart, Guardian ad litem, for appellants.

Lincoln Frost and *Morning & Ledwith, contra.*

REESE, C. J.

This is an action for the construction of the last will and testament of Abraham Herter, late of Lancaster county, deceased. The suit is brought by the alleged devisees under the will against the grandchildren of decedent and their mother, the one time daughter-in-law of the testator. The will is quite informal, but it has been admitted to probate by the county court of Lancaster county, due notice of which proceeding was given, and from the decree of probate no appeal was taken. Those proceedings must be treated as final and conclusive, and cannot be attacked in this collateral way. *Kolterman v. Chilvers,* 82 Neb. 216; *Byron Reed Co. v. Klabunde,* 76 Neb. 801; *Brown v. Webster,* 87 Neb. 788; *Loosemore v. Smith,* 12 Neb. 343. We must therefore examine the will, as a legally established instrument, and endeavor to ascertain its meaning.

The family of the testator originally consisted of his widow, Katherine Herter, two sons, Jacob Herter and Frederick C. Herter, and a daughter, Catherine Herter, now Catherine Faulhaber. Prior to the making of the will Frederick C. Herter died, leaving a widow, Louise, and two children, Louise and William J. Herter, surviving. Within about one year after the death of Frederick C. Herter his widow intermarried with her deceased husband's cousin, Henry C. Herter. Testator and wife resided upon a farm consisting of 160 acres of contiguous land, described as the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter, of section 10, township 9, range 8, which is referred to as his homestead; he and his family having resided upon it for many years. He had also accumulated a considerable quantity of other

land in Lancaster county, as well as a farm of 160 acres in Hitchcock county. Probably for the purpose of securing and retaining a safe living for himself and wife in their advanced age, and possibly for the purpose of trying out and testing the capacity of his three children, all of whom were married, he leased to each one a quantity of land for the rental of one dollar an acre annually, the homestead of 160 acres being leased to Frederick, who was his youngest living child, other children having died in infancy and without issue. Frederick and wife became members of the family, living with his parents until about one year before his decease, when he built a new house upon the premises, and which he and his family occupied. After the marriage of Louise, his widow, to Henry C. Herter, they continued to reside upon the premises for a time, but, owing to some disagreement, Henry and his family, consisting of his wife and the two minor children, above named, removed from the farm and resided elsewhere. Some time before the making of testator's will, but after the death of Frederick and the marriage of Frederick's widow to Henry C. Herter, testator conveyed the leased land to Jacob and Catherine, and on the 29th day of May, 1905, he and his wife executed a trust deed to Jacob W. Herter, conveying to him the said homestead of 160 acres in trust for Louise and William J.; the grantors reserving the use and possession of the premises during their lives. This deed was executed and delivered to the trustee at or about the same time; other lands of approximately the same value were conveyed to the two surviving children, Jacob Herter and Catherine Faulhaber. Jacob put his deed upon record, but has withheld the trust deed therefrom until during the trial, notwithstanding he testified that his instructions from his father were to record all at the same time. We do not question his motives, but assume his failure to be a mistake of duty, as he was required to record that deed with his own.

The will is in two parts, the first dated June 9, 1905, signed by the testator, but not witnessed. The second is dated November 1, 1905, signed, and witnessed by two wit-

nesses. They were both admitted to probate as constituting the last will and testament of the testator. It was evidently prepared by the testator, and is given here in full:

"Bennet Neb. June 9, 1905.

"This is my last will.

"When I am passed away, I want that you take the Drexler Bros., to furnish coffin and coach and furnish all the stuff what you need at such an occation. I want to be buried at the side of our beloved Fritz and Eddy and Katies and Philips Baby girl if possible. If the Church doesn't allow it, then you burry me at home some place in the garden. After this you go and divide all the moneys and notes, amongst you, Katherine, Jakob and mother and all other things what mother don't want. Jakob will be a trusty administrator for the two grandchildren Louise and Willy. This estate will make a good deal trouble, to make things go the right way. That Henry & Louise can not get a hand in your fees what the law allows you must get from the rent the farms brings in. For a tomstone I want you to buy a Granit, about the shape of the stone that is on Eddys grave. Get it if possible made by a German, for I want the inskription made in German. I do not care what people will say. A fifty dollars tomstone is all you must get for me, the engravings may be like this

"Hier ruhet in Gott
"Abraham Herter geb Aug 20, 1831.
"gest Dan und dan
"Ruhe im Frieden samft und wohl

"The eighty acre farm in section twelf (Grand Pr.) you get it in comp, and make the best of it.

"The rent you will pay to Mother as long as she lives, or as long as she wants it. The farm in Hitchcock County you get it in comp also and make the best of it.

"My wish is also, do not give morgage on your farms.

"Abraham Herter.

"November 1, 1905.

"If it should happen, that one of them two children would die, before it were on age, the eastate would in this

case to go to the other. And in the case that both should die then the eastate shall go back to J. W. Herter and Katie Herter Faulhaber. Not to their mother Mrs. Louise, wife of Henry Herter, and that J. W. Herter the administrator shall have the power to tend to this affair, according he thinks it best, and that nobody shall have the right to interfer with him in this case & it is my wish & will that he need not give bonds.

"Abraham Herter.

"Witness,

"Henry Fetzer.

"I. George Oberle."

It will be observed that the will is written in the second person. In the first paragraph the direction is to "devide all the moneys and notes, amongst you, Katherine, Jakob and mother and all the other things what mother don't want. Jakob will be a trusty administrator for the two Grandchildren Louise and Willy. This estate will make a good deal trouble, to make things go the right way. That Henry & Louise cannot get a hand in your fees what the law allows you must get from the rent the farm brings in," etc. It is also to be noticed that in the last paragraph it is provided if one of the two children should die the estate would go to the other, if both die "then the eastate shall go back to J. W. Herter and Katie Herter Faulhaber. Not to their mother Mrs. Louise, wife of Henry Herter." These provisions show, in the light of the evidence adduced upon the trial, that the personal property is to be divided between the two living children, Jacob and Catherine, and their mother, and that the "you" is mainly directed to Jacob, whom he designates as the administrator of the will, except that part devising the 80-acre farm in section 12 in "Grand Pr." and the farm in Hitchcock county which it is claimed are devised to his widow and Jacob and Catherine as joint tenants, and that it was the clear intent and purpose to absolutely exclude Henry Herter and wife from all participation in his estate, so far as receiving any part therein by virtue of the will is concerned.

The pleadings are too long to be set out here. It must be sufficient to say that the findings and decree followed the averments of the petition. A guardian *ad litem* was appointed for the minor children, who answered for them and their mother, Louise Herter, their guardian, first, by a general denial; second, alleging the relationship of the minors to Frederick C. Herter, deceased, and his relationship to the testator, and that his decease was long prior to the decease of the testator; third, alleging their ownership of the homestead of 160 acres by virtue of the trust deed given to J. W. Herter for their use and benefit; fourth, that Jacob and Catherine are the only surviving children of Abraham Herter, deceased, and that the decedent had given to Jacob 200 acres and to Catherine 160 acres of valuable land in Lancaster county, and that all the remainder of the real estate and personal property was intestate estate and descended to plaintiffs and defendants, minors, in the manner provided by law for the descent of intestate property. On the trial, the district court by its decree granted to plaintiffs the relief demanded, and so construed the will as to quiet the title to the 80 acres in section 12 (Grant Pr.) and the land in Hitchcock county, by proper descriptions, in the plaintiffs, Katherine Herter and Jacob Herter and Catherine Faulhaber. The guardian *ad litem* appeals.

The object and purpose of the court in construing a will is to carry out and enforce the intention of the testator. It is quite apparent from the action of the testator (prior to the making of the will) that he sought to make final and full division of his land among his children and the two grandchildren, but deferring the possession of the minors until after the decease of his widow and the expiration of a lease to plaintiff J. W. Herter and Philip Faulhaber, which lease would expire March 1, 1918, the rent payable to Katherine Herter, testator's widow, so long as she lived. It is evident that, should she depart this life before the termination of the lease, the rent would be payable to the two grandchildren. The title to the land in Grant precinct in Lancaster county and the 160 acres in

Hitchcock county were acquired by the testator subsequent to the execution of the deeds to the other lands, and, if they are not transferred by the will, they are intestate property and would vest in the heirs according to the law of descent. What was the intention of the testator upon that subject? There is nothing in the will specifically devising those two tracts of land to any one. The only reference to them is found in the following clause: "The eighty acre farm in section twelf (Grand Pr.) you get it in comp, and make the best of it. The rent you will pay to Mother as long as she lives, or as long as she wants it. The farm in Hitchcock county you get it in comp also and make the best of it." It sufficiently appears from the evidence and from the will itself that the word "comp" must be construed to mean "company," and the question is: To whom does the word refer? Is it the widow, Katherine Herter, Jacob Herter and Mrs. Faulhaber, or to his heirs, including the two grandchildren, Louise and William J., the children of the deceased son Frederick? If to the latter, the surviving widow of testator Jacob Herter, and Mrs. Faulhaber and the two surviving children of Frederick, deceased, representing what he would have taken had he been living, each receives one-fourth interest, the rental to go to the support of the widow of the testator so long as she might live. If to the former, the widow of testator and the two living children, Jacob Herter and Mrs. Faulhaber, receives each one-third, with the rental to the widow during life. It is clear that all the personal property was given to the three last named, by the provisions of the first paragraph of the will. No reference is made to the grandchildren, but that part of the estate is specifically conferred upon the three named. The only reference to the two grandchildren in that part of the will dated June 9, 1905, is "Jakob will be a trusty administrator for the two grandchildren Louise and Willy." There is nothing in the will specifically conferring any property, real or personal, upon these two grandchildren, nor is there anything excluding them from participation in the estate, nor is the 80-acre farm in Lancaster county or the

160-acre tract in Hitchcock county specifically devised to any one by name. It seems that at the time the deeds were executed Mr. Herter sought to make as near an equal distribution of the land he then owned as he could, and, to carry out that purpose, he gave the two grandchildren the home farm, which he had rented to their father, evidently with the design of giving him the title at a future day. Frederick died, but his children were given by the trust deed what he was to receive. At the time of making the will the two tracts were undisposed of. We think it fair to presume that his mind had not changed to the disadvantage of the grandchildren, and that he intended them to receive what their father would have inherited had he been living, and that the use of the word "comp" could just as well include all as any part of his heirs. It is shown by the testimony that he had never entertained any ill will toward the two minor children. The spirit of fairness shown throughout his dealings with his blood kin supports rather than repels this presumption.

As held by us in *Heilman v. Reitz,* 89 Neb. 422, it is fundamental that heirs will not be disinherited by conjecture, but only by express words or necessary implication, and that the actual disposition of the estate to another person is necessary to deprive the heir of the property of his ancestor. We deem it also fundamental that, in the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interpret or distract the descent or direct it in a different course should require plain words to that effect. *Wright v. Hicks,* 12 Ga. 155. See, also, 30 Am. & Eng. Ency. Law (2d ed.) 668. And that evidence of the declaration of the testator is inadmissible to establish his testamentary intention, or to aid in the interpretation of his will. *Zimmerman v. Hafer,* 81 Md. 347; 40 Cyc. 1433.

We can find nothing in the will, which, with any clearness, evinces a disposition on the part of the testator to disinherit the grandchildren or exclude them from the

"comp" named in the clause of the will under consideration. As we view the language of the will, in the light of the authorities and the circumstances under which the will was made, we are forced to the conclusion that it was not the purpose of the testator to exclude his grandchildren from any participation in the two tracts of land referred to.

The decree of the district court should be so modified as to permit the children of Frederick Herter to participate in the titles of the lands described as the west half of the southeast quarter of section 12, township 9, range 7, in Lancaster county, and the southwest quarter of section 4, township 4, range 32, in Hitchcock county, to the extent of one-eighth interest each therein, and Katherine Herter, the widow of Abraham Herter, and Jacob Herter and Catherine Faulhaber, each one-fourth, the incomes therefrom to be paid to Katherine Herter during her natural life, and at her decease or waiver of her right to the rent the land to be held as joint tenants, and that the title be quieted accordingly.

The cause is remanded to the district court, with directions to enter a decree in accordance herewith.

REVERSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JOE HILGER, APPELLANT, V. CITY OF NEBRASKA CITY ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,854.

1. **Municipal Corporations:** GRADING OF STREETS: INJUNCTION. The pleadings and evidence examined, and found to sufficiently support the decree of the district court.

2. ———: ———: RIGHT TO DAMAGES. The mere establishment of a grade of the streets in a city does not damage the property which would be affected by the change in the physical grade of the streets. It is the change in the surface of the streets which

creates the damage, if any, and for which the allowance of damages must first be provided. If no change is ever made or undertaken, there is no damage.

3. ———: ———. Where the grade of the streets of a city has been established and the level of the street reduced in part to the grade, and only a limited expense would be incurred in finishing the grade, the work may be completed by the city authorities without the formality of requiring an estimate to be made by the city engineer, bids advertised for, assessment of damages made, and special taxes levied. Where the work to be done is so slight, it may be done by the city under the direction of the proper officer thereof and payment therefor made from the proper revenues of the city.

4. ———: ———: DAMAGES: LIMITATIONS. The statute of limitations will not begin to run against a lot owner suffering damage from the establishment of the grades of adjacent streets until some action is taken by the city to change the streets to the grade.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

W. F. Moran, for appellant.

Andrew P. Moran and *John C. Watson, contra.*

REESE, C. J.

Action for an injunction to restrain the defendant city from grading a portion of Tenth street to what is known as the "Rosewater grade" thereof, and by which it is alleged plaintiff's property will be seriously damaged. It is alleged in the petition, in substance, that the city is a municipal corporation having a population of between 5,000 and 25,000, and is being governed under the commission form of government, provided by the statutes of the state, and that defendant Hawley is one of the commissioners; that plaintiff is the owner of lots 1 and 2, in block 94, in said city; that Tenth street extending between First and Second corsos adjoins said property on the east (First corso adjoining it on the north), and that said property is improved, buildings erected thereon, sidewalks built, and shade trees planted with reference to the surface grade of the street; that the surface of the street had been es-

tablished by user and common consent for many years; that defendant Hawley, claiming to act as one of the commissioners under the authority of said city, is attempting to grade said street, lowering the surface thereof to what is known as the said "Rosewater grade," cutting down and threatening to lower the street more than three feet; that no ordinance nor resolution was passed by the commissioners of said city directing the grading or lowering of the grade of said street, no petition having been filed therefor; that no estimate of the expense of lowering the grade was made, nor any provision made for the payment of the same; that no bids had been advertised for, and no appraisement of plaintiff's damages had been made nor the amount of damages tendered; that the lowering of the street would destroy plaintiff's shade trees, render his alley inaccessible, and leave his sidewalk on a high bank; that plaintiff's property would be greatly damaged, and for which he had no remedy at law. A restraining order was issued by the county judge, which continued in force until the trial of the cause.

The defendant city answered, objecting to the petition as failing to state facts sufficient to constitute a cause of action; alleging that plaintiff had an adequate remedy at law; admitting that plaintiff was a citizen and taxpayer of the city, and was the owner of the property described in the petition; that the city is operated under the commission form of government, with a population as stated in the petition, and denying all other averments thereof; alleging that the grade of the street had been established long before plaintiff's purchase of the property involved and before any lasting improvements were made thereon; that the improvements were made with full knowledge of the existence of the established grade; that plaintiff and his grantors had waived any right to damages by their failure to demand compensation when the grade was established; that the street had been used by the public for more than 40 years, during which time it had been worked and graded as occasion required. The defense of the stat-

ute of limitations is also presented. Plaintiff replied by a general denial.

The school district of Nebraska City applied for leave to intervene upon the ground that the question involved was one of interest to the district. Its intervention was permitted by the court, over the objections of plaintiff. By its pleadings it is alleged that on the 25th day of May, 1891, the city council enacted an ordinance creating grading districts, plaintiff's property being included therein, "having previously passed ordinance No. 122 establishing the general grade throughout said city;" that defendant Hawley, as one of the city commissioners, had charge of the streets and alleys of the city; that Joseph Walker, a defendant, is only an employee of the city in reducing the grade under the directions of commissioner Hawley; that the school district had erected a valuable high school building on the side of the street opposite plaintiff's property, and it was the desire of the district that the walks be brought to grade to protect the high school grounds from water draining upon and over said grounds and injuring the school building; that plaintiff, being a recent purchaser of his lot, had full knowledge of the existence of the ordinance establishing the grade at the time of his purchase, and his grantors had waived any claim for damages; that by the long use of the street by the city and public an easement and the right to grade was created.

The cause was tried to the court, the trial resulting in a finding and decree that plaintiff was not entitled to all the relief demanded, but that he was entitled to an injunction against defendants restraining them "from grading plaintiff's property on the west side of Tenth street between First and Second corsos within the curb line thereof, being 12 feet from the lot line," with the proviso that the space may be graded after the city shall have made provision for the payment of the damages for such grade between the curb and lot lines. The restraining order was vacated, but the decree stands in plaintiff's favor as above indicated. Plaintiff appeals, and defendant city and intervener schoool district file a cross-appeal.

It is quite clear that the used part of Tenth street has on prior occasions been worked down to the extent of a few feet, with the intent to finally bring it to what is termed the "Rosewater grade," established in 1887. First corso has been brought to said grade. The declared purpose of defendant Hawley at the time he began the work, and from that time on, was to bring Tenth street to that grade, but no lower. The street, having been partially brought to grade, required an expenditure of only $120 to complete the leveling process. This seems to have been necessary for the protection of the public library and high school property, situated on the east side of Tenth street and opposite plaintiff's property, from the drainage and overflow from the street. It is claimed by plaintiff that the provisions of section 8601, Ann. St. 1911, should be applied. The section is an unusually long one and cannot be set out here, but we cannot agree with plaintiff in this particular. That part of the section which provides for the filing of petitions, the assessment and payment of damages to the lot owners refers to the creation, opening and improvement of streets, and is to be applied to new and constructive work, and, in order that there might be no misapprehension upon that subject, it is specifically provided that those provisions "shall not apply to ordinary repairs of streets or alleys," and provision is made for the payment of expenses growing out of such repairs without the levying of special taxes. The statute must receive a reasonable construction and application, and it would be unreasonable to hold that where a grade had been long established, as in this case, the street had been previously worked down to near the grade, and it is not deemed necessary to levy a special tax upon abutting property to pay the slight expense of bringing a portion of the street to such grade, the formalities provided by the section should be observed. In such light cases much is left to the judgment and discretion of the commissioner having the matter in charge. The order of the court protecting the rights of plaintiff in the matter of the space between the curb and his lot line is equitable, and will not be dis-

turbed. We have examined the cases of *Shewell v. City of Nebraska City,* 52 Neb. 138, and *Hurford v. City of Omaha,* 4 Neb. 336, and cannot see that they are in point, or that they control this case.

The contention by cross-appellants that plaintiff had an adequate remedy at law, if any remedy at all, and that he has mistaken his remedy, cannot be sustained. As it was correctly found that plaintiff was entitled to protection as against the invasion of his sidewalk space, which had never been molested by the city authorities, and that he was entitled to damages in case of such invasion, to be provided for prior thereto, it gave plaintiff a sufficient standing in a court of equity.

It is also claimed that plaintiff's right to damages is barred by limitation of time. This claim cannot be sustained. The mere establishment of the grade did not give plaintiff or his grantors a cause of action. His property may never have been molested. The cause of action, if one is created, is by the physical invasion of the property, and before that can be done his damage must be provided for.

While the decree may be said to be somewhat unusual in some respects it is equitable, and is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

H. K. BLACK ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1914. No. 18,742.

1. **Criminal Law:** APPEAL: AFFIRMANCE. The record submitted, and on which a reversal of the judgment of the district court is demanded, does not affirmatively show any prejudicial error committed against plaintiffs in error.
2. **Game Laws:** VALIDITY. The unconstitutionality of certain sections of the game laws of this state is alleged, but no sufficient reason is pointed out to justify the contention.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher and *William P. Rooney,* for plaintiffs in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

This is a proceeding in error to the district court for Dawes county. The record before us shows that plaintiffs in error, who will hereafter be referred to herein as defendants, were arrested upon a warrant issued by the county judge of Dawes county upon a complaint filed by W. W. Naylor; the first count thereof charging the defendants with going upon the lands of the complainant in said county on the 10th day of May, 1914, and unlawfully fishing and angling for fish with rods, lines, and hooks, with the intent to capture the same, they not having the consent of the said Naylor so to do. The second count of the complaint is to the effect that the defendants and one Ed. Czerney did go upon said lands in said county on said day and wrongfully did take and kill two trout on the land of said W. W. Naylor, the same not being public land, and without the consent of said Naylor; said taking and killing of said trout being done with rods, lines, and hooks. There is also a complaint copied into the county judge's transcript, made by one Ed. P. Butler, deputy game warden of said county, charging that defendant Johnson was guilty of fishing on said day without a license so to do; but just what was the purpose of that complaint is not made clear. Whether it was intended as a second and independent prosecution, or was intended as a part of the main case, is past finding out from the record. The defendants were tried before the county judge, found guilty, and fined in the sum of $5 each. The cause was removed to the district court, where, it is recited, a jury trial was had, it being stipulated that the trials should be had at the

same time to the same jury, but the record fails to show what the verdicts were. There is a kind of running history of the proceedings, presumably prepared by counsel, in which it is said a trial was had, when the jury returned into court the verdicts "in words, letters and figures following: (To Clerk: Here copy verdicts, with indorsements)—which are received and recorded by the court," etc.; but the clerk failed to "copy," and there is no record of the "verdicts" anywhere in the transcript. There were probably separate verdicts, but what they were we are unable to say; the record giving no information upon that subject. In this condition of the transcript, it is impossible for us to say what the proceedings were, and, all presumptions being in favor of the regularity of the acts of the district court, we will presume that court did its duty.

It is shown by the record that each defendant was fined $5 upon the joint complaint, and Johnson was fined $10 for fishing without a license. As the record shows there was more than one verdict, it may be that more than one trial was had, although to the one jury by agreement as per stipulation, or otherwise. Upon this part of the case no prejudicial error affirmatively appears, which must be the case before this court can reverse a judgment.

It is claimed that, for various reasons, the law under which this prosecution arose is unconstitutional, but we are unable to discover any infraction of the constitution in the substance or passage of the section referred to.

The judgment of the district court is

AFFIRMED.

COLUMBIA RIVER DOOR COMPANY, APPELLANT, V. H. F. CADY LUMBER COMPANY, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,952.

1. **Sales: ACCEPTANCE.** Where the purchaser of lumber, who is known to the seller to be a jobber, after an inspection and rejection of the shipment, attempts to sell the lumber to other purchasers, while acting under the order of the seller to "use to best advantage," his attempts will not amount to an acceptance.

2. ———: REFUSAL TO ACCEPT: SUFFICIENCY OF EVIDENCE. Evidence examined, and found sufficient to justify the defendant in refusing to accept the shipment.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

DeBord, Fradenburg & Van Orsdel, contra.

BARNES, J.

This was an action to recover the price of a car-load of lumber shipped by the Columbia River Door Company to the H. F. Cady Lumber Company in August, 1907, and billed by plaintiff to Tidball & Company at Morefield, Nebraska. The defendant refused to pay for the shipment, alleging that it did not accept the lumber because it was not what was ordered; that it was defective in kind and quality, and in fact was not merchantable. The cause was tried to a jury, and a verdict was returned for the defendant. Judgment was rendered on the verdict, and the plaintiff has appealed.

It appears that the defendant, a jobber of lumber, on the 2d day of September, 1906, sent an order to the plaintiff for three car-loads of common spruce 2x4's. The first car was shipped to the defendant soon after it made the order; the second car was shipped about six months later, while the third car was not loaded and shipped until a year later, to wit, August 16, 1907. The first car of lumber was received and paid for, but the testimony shows that there was some trouble with the plaintiff about the second car. This car appears to have been loaded with a bad lot of irregular dimension stuff, which contained bad knots, wanes on the corners, was of irregular thickness, and was in fact generally a car of culls. When the second car was shipped the Columbia River Door Company knew that it contained a lot of lumber not up to specifications. By the testimony, as to this car, it was practically admitted that it was not up to standard, and the plaintiff agreed to

deduct $75 from the price of the car, as billed, in order to affect a settlement with the defendant.

Respecting the last car of lumber, the one in controversy, it appears that defendant ordered it shipped direct to Tidball & Company at Morefield, Nebraska, for the reason that it had sold the car to that company. It appears that Tidball & Company had a lumber yard at Morefield and one at Curtis, Nebraska, which is the first station on the Burlington road east of Morefield. The testimony shows that Tidball & Company stopped the car at Curtis and inspected the lumber. John E. Tidball, Jr., testified that it was his duty to inspect lumber before letting it into their stock. He said that upon inspecting the lumber in question he found there were knot holes in some of the sticks as big as half across the 2x4; that he got up and looked on the top of the pile and pulled out a dozen or more of the sticks; that they proved to be knotty, and some were so thin that the planer had not surfaced them; that they were of various thicknesses, and many of the sticks were crooked; that he at once notified the Burlington railroad that they refused the car, and also at once notified the Columbia River Door Company that the lumber was bad, and that they would not accept it. The Cady Lumber Company telegraphed the plaintiff immediately that the lumber would not be accepted, and on receipt of this telegram the plaintiff replied that the lumber was just like the preceding cars, except that part of it was fir instead of being all spruce, and saying, "Use to best advantage." The railroad company subsequently unloaded the lumber on its right of way at Curtis. Neither the Cady Lumber Company nor the Tidball Lumber Company received possession of the lumber, or ever accepted it, and, so far as it appears from the evidence, the lumber is now in the possession of the railroad company or of the plaintiff.

Plaintiff's witness Stucker by his testimony explained why they put fir into the car when only spruce was ordered. He said there was not quite enough spruce in stock to fill it. Mr. White of the Cady Lumber Company testified that his company never consented that the plaintiff might

put any fir lumber into the car. The testimony shows without dispute that the Cady Lumber Company ordered the car in question to fill an order which it had from the Tidball Lumber Company, and that the Tidball Lumber Company ordered a car of spruce. It appears that there was no means whatever by which the Cady Lumber Company or the Tidball Lumber Company could have inspected the lumber before it reached Curtis.

Mr. Stephenson, who was in the employ of the defendant, went to Curtis and viewed the lumber. He testified, in substance, as follows: "I measured perhaps 150 to 200 pieces. Measured them at both ends, in the middle, and on the sides, so as to make sure just what there was of it. I found 2x4's as they would run according to measurement $1\frac{5}{8}$ by $3\frac{5}{8}$. I would find them lacking sometimes as to being as thick as that, having been shaped and ordered as trimmed surfaces on both sides and one edge, which would be surfaced on one side all through the length, and would be surfaced on one edge all through the length; when they were too thin they would not surface. For instance, one edge would be thick enough to surface, and as you got out further it would not surface, and consequently you would have a 2x4 that was surfaced part of the way and rough on the other part. They were thicker on one end than on the other, and you would find the same on the edges instead of being $3\frac{5}{8}$ inches thick, so when you used them for studding or rafters, if you stood them to a line, you could not rafter the other side of them, for they would not surface. If you put a 2x4 under this $3\frac{3}{8}$ at one end, and a $3\frac{1}{8}$ at the other, you can see where your side would be; that is where you were throwed out, because they are not suitable for studding." Stephenson further testified that the 2x4's varied in width as much as one-half an inch. There were very large coarse knots, large knot holes, and some very crooked; the ends not square, broken pieces; some were not the full length for which they were counted, that is 16 feet lengths were not 16 feet long; knot holes would run clear across the 2x4's, or occupy two-thirds of the width of the 2x4. There was other testimony which

showed that only about 60 per cent. of the lumber contained in the car would grade No. 2; that it was poorly manufactured, uneven in thickness and width, exceedingly knotty, and contained more or less bark. It also appears that the Columbia River Door Company had for its principal business the manufacture of doors, and had some lumber which they could make into 2x4's which were not suitable to be used for that purpose; that they made the sale of the three car-loads of lumber to the Cady Lumber Company, intending to use the accumulation of 2x4's made by them out of lumber, which on account of its various widths or otherwise could not be made into doors, and that it took them a year to produce the three car-loads of lumber sold to the defendant out of such material. After the refusal of the car, it appears that the defendant, acting on the direction of the plaintiff to "use to best advantage," spent considerable time in trying to sell the lumber to other parties, but failed in its attempt.

The issue as to acceptance raised by the pleadings was submitted to the jury under the instructions of the court, and a verdict was returned for the defendant, as above stated. It is plaintiff's contention that the defendant accepted the car-load of lumber by attempting to sell it to other parties. We think this contention is not sustained by the evidence or the authorities.

Wolfe Bros. Shoe Co. v. Bishop, 72 Kan. 687, was a case where the dispute arose over the quality of certain shoes and their acceptance. It was there said: "Plaintiff's attempt to sell some of the shoes that were salable while waiting for defendant's agent to adjust plaintiff's claim that the consignment was defective, held not to amount to an acceptance of the entire lot."

In *Schwartz v. Church of the Holy Cross,* 60 Minn. 183, plaintiff sought to recover for the value of certain altars which had been ordered constructed and placed in the church. It was held that the use of some of the altars, after defendant's refusal to accept them because they were not manufactured according to specifications, did

not amount to an acceptance, and a judgment for the defendant was affirmed.

In *Lenz v. Blake,* 44 Or. 569, the court said: "The defendant had a reasonable time to inspect the goods after their receipt, and, if they did not correspond with those ordered, the warranty in respect thereto might have rendered that part of the contract tantamount to a condition precedent, thereby authorizing the defendant to repudiate its agreement."

In *Creighton v. Pacific Coast Lumber Co.,* 12 Man. (Can.) 546, it was said: "A purchaser of goods ordered to be sent by railway does not lose his right of rejecting the goods by unloading them from the cars on arrival and teaming them to his own premises, if he then finds them to be inferior to what he had ordered and so notifies the vendor within a reasonable time."

In *Armstrong v. Columbia Wagon Co.,* 66 Atl. 366 (22 Del. 274), we find the following language: "In an action for the price of a car-load of lumber, it was not material whether defendant knew that it came from plaintiff or not before unloading the lumber, as he had the right to unload and inspect it for the purpose of determining the quality and quantity." *Graves v. Morse & Co.,* 45 Neb. 604, and *Bryant v. Thesing,* 46 Neb. 244, are in line with this rule.

The evidence seems clear that defendant was justified in refusing to accept the lumber in question. An examination of the cases cited by counsel for the plaintiff on the question of the right of inspection and the waiver of that right shows that the goods in most of those cases were delivered to the nominal possession of the buyer and held without question or rejection.

From a careful inspection of the record, we are of opinion that it contains no reversible error, and the judgment of the district court is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

LAIN MCKENNAN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,698.

1. **Street Railways**: USE OF STREETS. The general public has an equal right with a street car company upon a public street of a city, but has not at all times the same right upon the track of the street car company. The public has a complete right to cross or drive upon the street car tracks, but not so as to hinder or interfere with the cars operated thereon.
2. ———: OPERATION OF CARS: DUTY TO AVOID COLLISIONS. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of railway ahead of the car; but he may continue to run the car in a proper manner until it appears that the driver is in danger and is unaware or heedless of his danger. It is then his duty to use all reasonable care and diligence to avoid a collision. Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car, but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle.
3. ———: ———: CARE REQUIRED. In such a case the motorman in charge of the car should use the care and diligence which an ordinarily prudent person would use under the circumstances.
4. ———: ———: COLLISIONS: LIABILITY. It is equally the duty of any person driving upon or across a street car track not to unnecessarily hinder, delay or impede the operation of cars thereon at the proper rate of speed at that time and place, and if he negligently does so, and by reason of such negligent act he is injured, he cannot recover, unless those in charge of the street car failed to exercise ordinary care to avoid a collision after they knew, or in the exercise of ordinary care should have known, his dangerous situation. *Omaha Street R. Co. v. Larson*, 70 Neb. 591.
5. **Evidence**: OPINIONS. Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, better evidence cannot be obtained; and this principle is applicable to indications of pain and suffering, even though observed some time after an injury.
6. **Appeal**: ADMISSION OF EVIDENCE: REVIEW. If testimony not properly admissible is brought out by a proper question, and no motion

to strike it out is made at the trial, the error is not subject to review.

7. **Instructions**, the substance of which are set forth in the opinion, *held* to be inconsistent with the main issue as stated by the court, and to be prejudicial to defendant.

8. **Damages**: PERSONAL INJURY: IMPROPER EXHIBITIONS. Exhibitions to the jury of scars of bodily injuries should not be permitted, unless they furnish evidence material to the issues to be determined.

9. **Appeal**: REQUESTED INSTRUCTIONS: REVIEW. A party, after having requested the giving of an instruction, cannot afterwards complain that it was erroneous.

Opinion on motion for rehearing of case reported in 95 Neb. 643. *Former opinion modified. Rehearing denied.*

LETTON, J.

In the former opinion in this case (*McKennan v. Omaha & C. B. Street R. Co.*, 95 Neb. 643), it was held that, there being a conflict in the evidence with relation to the circumstances surrounding the injury and also with reference to the extent of plaintiff's injuries, these questions were proper to be submitted to the jury. It was also held that the first paragraph of instruction No. 7 was incorrect as applied to the facts in this case. The language of this part of the instruction was not applicable, since the statement "that teamsters have the legal right to cross the street at any point thereon" had no relevancy to the issues. It was also said that this instruction is correct as to the rights of the street car company and plaintiff at intersection or cross-streets, but that it failed to properly distinguish their respective rights at other points in the street. We think the latter statement and the further criticisms of the instruction should be withdrawn.

In *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, this court said: "Street railways are constructed and operated on public highways under grants of that right by municipal corporations. The grant is of a privilege to occupy and use these streets in conjunction with, and not to the exclusion of, the general public."

In *Olney v. Omaha & C. B. Street R. Co.*, 78 Neb. 767, it is said: "The right to use the streets of a city by the driver of a horse and the manager of a street car company are equal, and each must use it with reasonable regard for the safety and convenience of the other."

In *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209, it is said: "Whatever the rule in some states may be with respect to the rights of pedestrians and street cars upon the streets of a city, the law in this state is settled that neither the street car nor the pedestrian has any priority or privileged right over the other; that an electric street railway company and an ordinary traveler upon the street are required to observe an equal degree of care to prevent accidents, and that neither has a right of way superior to that of the other. *Omaha Street R. Co. v. Cameron*, 43 Neb. 297; *Mathiesen v. Omaha Street R. Co.*, 3 Neb. (Unof.) 747; *Omaha Street R. Co. v. Mathiesen*, 73 Neb. 820; *Olney v. Omaha & C. B. Street R. Co.*, 78 Neb. 767."

Under ordinary circumstances, one who negligently attempts to cross a street railway track or to drive upon it in front of an approaching car cannot recover for injuries caused by a collision therewith, unless those in charge of the car fail to exercise ordinary care to prevent the accident after knowledge of his probable danger. *Omaha Street R. Co. v. Larson*, 70 Neb. 591; *McLean v. Omaha & C. B. R. & B. Co.*, 72 Neb. 447, 453; *Lindgren v. Omaha Street R. Co.*, 73 Neb. 628; *Chunn v. City & S. R. Co.*, 207 U. S. 302, 28 Sup. Ct. Rep. 63; 2 Nellis, Street Railways, sec. 462.

There was no intention to change the established rule in this state by the opinion in *Harris v. Lincoln Traction Co.*, 78 Neb. 681, in which case it was not quite accurately said that in such a case the defendant would not be liable, unless those in charge of the car "wilfully or wantonly" produce the collision. The words "wilfully" and "wantonly" being used disjunctively, the word "wantonly" evidently was not meant to express the idea of intentionally or wilfully, but that of "carelessly" or "negligently." *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Cleveland, C., C. & St.*

L. R. Co. v. Tartt, 64 Fed. 823. It may be noted that this is the thought expressed in the instructions tendered by defendant.

A good statement of the proper rule is found in *Fujise v. Los Angeles R. Co.,* 12 Cal. App. 207, 216: "The sum of the adjudicated cases bearing upon the relative rights of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but neither has the exclusive right. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of a railway ahead of the car; but he may continue to run the car in a proper manner until he is conscious of the fact that the driver is unaware or heedless of his danger. When he is thus conscious, it is his duty to use all reasonable care and diligence to avoid running the car into the vehicle. Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car, but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle." See, also, *Callahan v. Boston Elevated R. Co.,* 205 Mass. 422, 18 Am. & Eng. Ann. Cas. 510; *Indianapolis Traction & Terminal Co. v. Kidd,* 167 Ind. 402, 5 Street R. Rep. 204; *Acton v. Fargo & M. Street R. Co.,* 20 N. Dak. 434, 7 Street R. Rep. 499; *Greene v. Louisville R. Co.,* 119 Ky. 862, 7 Am. & Eng. Ann. Cas. 1126.

In the former opinion it was held that the refusal to give instructions Nos. 15 and 16 requested by defendant was erroneous. It appears, however, that instruction No. 15 was embodied in the charge of the court upon its own motion, though marked as refused when tendered by defendant. Instruction No. 16 was refused for the reason that it was not tendered to the court within a reasonable time. We considered this reason not adequate. Upon a critical examination of the language of the instruction, we are of the opinion that the court properly refused to give it. This instruction makes the standard of care the exercise of the

best judgment of the individual motorman. The rule is laid down by the supreme court of the United States in *The Germanic,* 196 U. S. 589, as follows: "But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The motion that it 'should be coextensive with the judgment of each individual' was exploded, if it needed exploding, by Chief Justice Tindal in *Vaughan v. Menlove,* 3 Bing. N. C. (Eng.) *468, *475." In the case referred to, Chief Justice Tindal said: "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." The motorman was held to use that care and diligence which an ordinarily prudent man would use under the circumstances of the particular case. "The standard is universal, unless in those cases where the law imposes an absolute liability." 1 Shearman and Redfield, Law of Negligence (6th ed.) sec. 9*b; Daily v. Burlington & M. R. R. Co.,* 58 Neb. 396; *Harrington v. Los Angeles R. Co.,* 140 Cal. 514; *McIntyre v. Orner,* 166 Ind. 57; *Barnes v. Danville Street R. & L. Co.,* 235 Ill. 566.

A number of assignments of error were made by the appellant which were not considered in the former opinion. The first point urged is that the court erred in permitting nonexpert witnesses to testify to their conclusion or opinion that McKennan was sick and hurt and suffered pain. It is said that this invaded the province of the jury. We think there is no merit in this contention. In 2 Jones, Commentaries on Law of Evidence, sec. 366, it is said, quoting from a New Hampshire case (*Hardy v. Merrill,* 56 N. H. 227): "'But without reference to any recognized rule or principle, all concede the admissibility of the opin-

ions of nonprofessional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention.' Admittedly difficult as the task of framing a rule on the subject is, Foster, Chief Justice, in the New Hampshire case referred to, formulated a rule, which, if properly applied, will serve as a useful instruction. *Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained.*" See, also, 3 Wigmore, Evidence, sec. 1974; *Hewitt v. Eisenbart,* 36 Neb. 794; *Western Travelers Accident Ass'n v. Munson,* 73 Neb. 858.

It is next claimed that there was error in permitting Dr. Pepper to testify relative to finding the plaintiff in a convulsive condition six months after the occurrence of the injury without connecting this incident as a result of the accident. The court probably admitted this testimony upon the theory that it would be connected up afterwards, which it was within its discretion to do. The question which brought out the testimony only had reference to the appearance of McKennan when the physician was called, and it could not be foreseen by the court what the answer would be. The question was not improper. No motion was made either at that time or in any later part of the trial to strike out this testimony upon the ground that it had not been connected with the accident. In order to save the point for review this was necessary.

Objection was also made to the reception of evidence relative to the expectoration or vomiting of blood by the plaintiff without showing that it was the natural or probable result of the accident. The testimony of plaintiff's

surgeon was that such bleeding would be improbable, but not impossible, as a result of the injury. Other physicians testified much to the same effect. The court, at the request of defendant, gave an instruction to the effect that defendant should not be held responsible for any spitting or vomiting of blood by the plaintiff that is not shown by the evidence to have been caused by the accident of January 20, 1911, and that it is the probable and not the possible cause that should be considered by the jury. The evidence may not have been of much weight, but it was for the jury to determine whether there was sufficient evidence to justify a conclusion that the spitting of blood resulted from the injury.

Complaint is made that the court erred in submitting to the jury whether the speed of the car was the proximate cause of the accident, whether the failure to have the car under control was the proximate cause, and whether the failure to exercise ordinary care in striking the wagon was the proximate cause. By instruction No. 6 the jury were told: "That under the pleadings and evidence in this case the only charge of actionable negligence that you are required to consider is that after the plaintiff started to turn upon the street railway track on which the south-bound car was running, or while he was in a position of peril or danger by reason of having his wagon upon such track, the defendant, in the exercise of ordinary care, should and could have so reduced the speed of said car or stopped the same as to avoid striking or colliding with his wagon." By instruction No. 7 the jury were told, among other things: "If you believe from the preponderance of the evidence that an ordinarily prudent man would not have been running the car at the rate of speed which you find from the evidence that the car was running at the time the operator of the car discovered the plaintiff on the track, and that the rate of speed was the proximate cause of plaintiff's injury, then you should find the defendant was negligent in that particular." By the ordinances of the city the car might lawfully be operated at any speed up to 15 miles an hour. The testimony is that

before the collision the car was moving at the rate of from 8 to 12 miles an hour, as variously estimated by the witnesses. The court further instructed the jury: "If you find from a preponderance of the evidence that defendant did not have his car under such control at the time the motorman discovered plaintiff on the track as an ordinarily prudent person operating a car under like circumstances would have done, and that such failure was the proximate cause of plaintiff's injury, then you should find the defendant negligent in that particular."

These directions are inconsistent with instruction No. 6, tended to confuse the jury, and were prejudicial. As long as there were no indications that the track would be obstructed, the defendant was not negligent in operating its car within the legal rate of speed, and, if it was so doing at the time the plaintiff turned to go upon the track, the rate of speed could not constitute negligence. As the court had said, the only ground of actionable negligence was whether the defendant might have slowed down or stopped the car in time to avoid the injury after the plaintiff's wagon was upon the track.

Complaint is made that plaintiff was allowed to exhibit scars on his body made as the result of certain surgical operations; one of them being from an operation for appendicitis. "It is a too well-settled rule in this court to call for further discussion that the plaintiff in an action for damages for personal injuries may be permitted to exhibit to the jury, if he can do so, the contusions and wounds of which they consist." *Felsch v. Babb,* 72 Neb. 736. But the scars here exhibited were not from wounds occasioned at the time of the accident, and it would seem that the exhibition was unnecessary. We are not convinced that the error was prejudicial, since the amount of the verdict is not so great as to indicate that the passions of the jury were inflamed or their sympathy aroused. Such exhibitions, however, are not to be encouraged, and, unless they furnish evidence material to the question to be determined, should not be indulged in.

One of the paragraphs of instruction No. 11 is severely criticised by defendant for alleged erroneous statements therein contained. We are relieved from critically considering these alleged mistakes, for the reason that this particular portion of the instruction was specifically requested to be given by the defendant itself in No. 15 of its requests. The court having given the instruction, defendant cannot now complain that it was erroneous.

Upon the whole case, we think that errors prejudicial to defendant occurred at the trial. The former opinion is modified in the respects mentioned, but the conclusion was correct and is adhered to.

The motion for rehearing is

OVERRULED.

HAMER, J., dissenting in part and concurring in the conclusion.

I regret my inability to fully agree with the majority opinion. The case is here on the motion of the plaintiff for a rehearing for the purpose of having us overrule our opinion reversing the judgment of the district court (95 Neb. 643), and it also has been heard upon certain assignments made by the defendant. There was a verdict and judgment in the court below for $3,900 in favor of the plaintiff. The plaintiff was driving his wagon on the street car track, and was going south over the west line of said track on Twenty-fourth street in Omaha. His excuse for being on the street car track with his wagon is alleged to be that there was another wagon on the west side of the street going in the same direction which he was going, and that he went upon the street car track for the purpose of going around this wagon. Witnesses testified at the trial that there was no such wagon. The plaintiff's testimony was not corroborated in full by the testimony of any witness. Paul Meek, a boy, testified for the plaintiff that he saw McKennan go around a *standing team*, but could not see whether the team was hitched or had a driver. I am unable to find testimony showing that any other witness

saw this team. Mary Meek, Reynolds, the motorman, Edward Galloway, Dean Berlin, J. A. Nichols, and Edgar F. Doyle, all testified that they saw no other team there. Paul Meek's testimony does not support the plaintiff's testimony and is unreasonable. If the plaintiff had gone around the team which he speaks of, it would have been behind him. This team is alleged to have been going south. If traveling in that direction, it would have been penned in when the accident occurred, and would have been there with the wagon, the street car, and the accident, and *everybody would have seen it.* In discussing the case we should not lose sight of its circumstances.

It was prejudicial error for the court to instruct the jury: "That defendant had the legal right to operate its cars over and upon its tracks at the time and place in question, and that teamsters have the legal right to cross the street at any point thereon, and their rights in this respect are equal and reciprocal, that is, each has the right to the use of the street in the ordinary and usual manner, and in doing so it is necessary for each to take into consideration the rights of the other." As the plaintiff had not crossed the street, but was driving along it on the street railway track *between the intersections,* the instruction was misleading, for the reason that it calls attention to an alleged state of facts not shown to exist. I am not satisfied with the paragraph in the syllabus of the majority opinion relating to this matter. It is not, as it seems to me, specific enough, and is objectionable for that reason. The body of the opinion touching the same matter is objectionable in the same way, although it shows research and many decisions.

Where the driver of a wagon drives along the street on the street car track, it is unfair to the public that he should be allowed to compel the street car to reduce its rate of speed to the same slow pace which he takes. The street car should be allowed to run at such a rate of speed as will accommodate the public. The better right of the street car company to the use of its tracks does not give it the right to exclude travelers from the street, and

such travelers should be allowed to move along the tracks or across them at any time and place where the same does not interfere with the progress of the cars, but of necessity, and in the interest of the public, where there is a conflict, the individual traveler must subserve the public convenience by yielding the right of way. *Hot Springs Street R. Co. v. Johnson,* 64 Ark. 420, 42 S. W. 833.

In *Laufer v. Bridgeport Traction Co.,* 68 Conn. 475, the court approved of the following instruction: "In the actual use of a common and public highway every person has an equal right to use it for his own best advantage to suit his own convenience or pleasure, but at all times with a just regard to the like rights of every other person. So far as rendering himself liable to damages is concerned, a man may drive fast or slow, with a light wagon or with a loaded team, with a well-broken horse or with an ill-broken one, along a crowded thoroughfare as well as a vacant street, provided he does not interfere with the just rights of any other person. If a man wishes to drive fast, he must do so with respect to the rights of those who drive slow. If he desires to drive slow, he must do so with respect to those who desire to drive fast. The loaded team and the light wagon must each pay a due regard to the rights of the other. If one drives in a crowded street he must exercise reasonable care not to endanger other travelers. If he drives an ill-broken horse, he must keep it so well in hand as not to expose others to unreasonable hazard."

Since the application of electric power to the running of street cars, it may be said that they have a common right in the streets with travelers, but they must be so managed as not to interfere unreasonably with the rights of persons who are passing along the streets. The street railway company and the traveler should each use the street in view of the rights of the other and to avoid inflicting an injury, and each is bound to exercise reasonable care. *Rapp v. St. Louis Transit Co.,* 190 Mo. 144; *Hall v. Ogden City Street R. Co.,* 13 Utah, 243.

In *Harris v. Lincoln Traction Co.;* 78 Neb. 681, the plaintiff crossed the tracks in the middle of a block. This court held that, "having contributed to the accident by his own negligence, there is no principle of law which will allow him to recover, unless he shows that he was wilfully and wantonly run down by those in charge of defendant's car." The writer does not indorse the statement here made. The street railway company should exercise reasonable prudence to avoid injury to those who occupy its tracks under all circumstances.

The above duty of the street railway company should not bar the right of the public to be served by the application of modern motive power to their means of transportation. It is the duty of persons, whether on foot or in vehicles, to give unobstructed passage to the cars. *Ford's Adm'r v. Paducah City Railway,* 124 Ky. 488, 99 S. W. 355; *Ehrisman v. East Harrisburg City P. R. Co.,* 150 Pa. St. 180, 17 L. R. A. 448.

Subject to the rule that he must exercise ordinary care for his own safety and not obstruct the passage of the cars, a person may drive upon the tracks of a street railway company laid in a public street without becoming a trespasser, but it is his duty to leave the track whenever his presence there serves to impede the passage of cars. *North Chicago E. R. Co. v. Peuser,* 190 Ill. 67.

Between street crossings a street railway company has a paramount right of way over its tracks whenever its right conflicts with the rights of a traveler on the street, and such traveler must reasonably give way to an approaching or passing car. The duty to exercise reasonable care and prudence in order to avoid injury rests alike upon the street railway company and the traveler. In an emergency, where the motorman in charge of the car honestly attempts to avoid injury to the occupant of the street, he should not be required to exercise the best judgment that may be applied to the subject after the event has gone by. If one acts with ordinary prudence in view of the situation and does his best then to avoid accident and consequent injury, he is not to be held to have been negligent, even

though his acts may not have been wise as determined afterwards in the light of all the surrounding facts.

I concur in the conclusion stated in the majority opinion that the former opinion should be modified and the motion for a rehearing overruled.

EVA BELLE HAIGHT, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,889.

1. **Appeal:** CONFLICTING EVIDENCE. A verdict rendered upon conflicting evidence will not be set aside unless it is manifestly wrong.
2. ———: PRESUMPTIONS. All presumptions are in favor of the regularity of the proceedings of the district court. Error will not be presumed, but must be affirmatively shown.
3. ———: JURY PANEL. Where it is asserted that the district court erred, in a county of over 30,000 population, in directing the sheriff to fill the panel of jurors instead of by requiring the clerk to draw the names of sufficient jurors from the jury box or wheel, it is incumbent upon the appellant to show that the list of names of persons competent to serve as jurors placed in the wheel as required by statute had not been exhausted at the time such direction was made by the court.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

John L. Webster, W. J. Connell and *William R. King, contra.*

LETTON, J.

This is an action to recover for personal injuries which it is alleged were caused by the sudden and negligent starting of a street car in the city of Omaha while the plaintiff was in the act of alighting therefrom. The jury returned a verdict for defendant. Plaintiff appeals.

Two reasons are urged for the reversal of the case: (1) That the verdict is not supported by the evidence; (2) that the jury which tried the case was illegally constituted.

As to the first point: Plaintiff's testimony was to the effect that, when the car stopped at Yates street, three passengers left the car in front of her; that the conductor did not give her time to alight, and that as she was stepping off the car it lurched forward and she fell striking the pavement with great force and was severely injured. On the other hand, the conductor, the motorman and four passengers testified that the car stopped to allow some passengers to take the car; that after these had entered the conductor pulled the bell cord and the car started; that the plaintiff then arose and informed the conductor she wanted to alight at that place; that the conductor pulled the bell cord, and that while the car was moving slowly, and before it had completely stopped, which it did within a few feet, the plaintiff stepped down, fell, and was hurt. In this state of the evidence it was for the jury, and is not for this court, to determine whether the plaintiff or these other witnesses were telling the truth, and there was sufficient evidence to support the verdict.

The district court for Douglas county consists of several judges. While one of the judges was conducting the trial of a criminal case, the regular panel of jurors became exhausted, and the district court made the following order: "The regular panel of petit jurors now having been exhausted and the jury in this case being incomplete, it is by the court ordered the sheriff summon from the body of the county twelve (12) men having the qualifications of jurors, from which to fill the panel in this case, or such other case as may be assigned for trial during the remainder of the third three weeks of the October, 1910, term of the district court." Talesmen were accordingly called to fill the panel, five of whom participated without objection in the trial of this case. The trial judge evidently proceeded under the provisions of section 8143, Rev. St. 1913, which is the general statute formerly applicable to every county in the state. In 1905 a statute was

enacted providing for the summoning of jurors in counties of 30,000 inhabitants or more. Rev. St. 1913, secs. 8148-8159. This statute provides for the selection by the county board each year of a definite number of names of qualified persons to serve as jurors in that year. These names are placed in a box or wheel, and on the first day of each trial term the clerk of the court draws 30 names of persons for each judge sitting with a jury, who shall act as jurors for the first three weeks of the term, and like proceedings are had for other periods of three weeks as needed. Section 8156, in substance, provides that jurors may be called by the sheriff, when directed by the court, when a vacancy in the panel exists and before the panel is filled, as in that section prescribed, for the trial of a case then pending, but that, "if for any reason the panel of petit jurors shall not be filled at the opening of such court, or at any time during the term, the clerk of such court shall, when ordered by the judge, again repair to the office of the clerk, and draw in the same manner as at the first drawing such number of jurors as the judge shall direct, to fill such panel." If there were names left in the jury box or wheel at the time the order was made, the proceeding was irregular; but there is no showing by the plaintiff that the regular list of names selected by the officers of the court under the statute and placed in the jury wheel had not been exhausted at the time this order was made.

The presumption always attaches that the proceedings of the court were regular, and the burden is upon any one attacking the validity of the same to establish his contention affirmatively.

In *Clawson v. United States,* 114 U. S. 477, 5 Sup. Ct. Rep. 949, it was held by the supreme court of Utah and by the supreme court of the United States, where the facts were that the names of 200 persons in a jury box as provided for by the acts of congress governing courts in the territory of Utah were exhausted, and the jury in a case on trial was only partly impaneled, that even without a statute the power of the court to issue an open venire directed to the sheriff to summon talesmen existed; that

such power was inherent in the court, was not forbidden by any statute, and still remained. Giving the presumption of regularity due weight, it must be presumed that at the time the order in this case, in the absence of evidence to the contrary, was made the names in the jury box or wheel had been exhausted, and the court had power to order the panel filled by the sheriff.

Furthermore, the general rule is that one cannot wait until after a jury has returned an adverse verdict before raising objections to the qualifications of jurors. The mere fact that he had no knowledge at the time is not sufficient to waive the requirement that the qualifications must be examined into before impaneling the jury. The means of knowledge were as easily accessible before the jury were in the box as they were after the verdict had been rendered. *Turley v. State,* 74 Neb. 471; *Reed v. State,* 75 Neb. 509; *Embry v. State,* 138 Ga. 464; *Faulkner v. Snead,* 122 Ga. 28; *Beals v. Cone,* 27 Colo. 473.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JOHN W. POWELL, APPELLANT, V. E. B. DEUCHLER, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,910.

1. **Evidence.** Admission of evidence complained of *held* proper under the statutory rule that, "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. * * * And when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Rev. St. 1913, sec. 7907.
2. **Evidence** examined, and *held* to support the verdict.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Sackett, Brewster & Spafford, E. A. Wunder and *John C. Hartigan,* for appellant.

Heasty & Barnes, contra.

LETTON, J.

Action by the indorsee of a promissory note against the maker. The note counted upon purported to be signed by E. B. Deuchler. It was dated November 4, 1909, due September 1, 1910, for $1,800, payable to the Columbian Hog & Cattle Powder Company. It is alleged that it was sold on August 1, 1910, to plaintiff in this case, and is indorsed in blank. The defense is a general denial. The instructions of the court properly submitted the issues raised to the jury, which returned a general verdict for defendant. It also found specially that the defendant did not sign the note; that he did not deliver it to the Columbian Hog & Cattle Powder Company; and that that company did not transfer the note to plaintiff. Plaintiff has appealed.

The contentions of appellant are that the court erred in permitting the cross-examination of the witness Cook concerning matters not covered by the examination in chief; that it erred in the admission of testimony of Deuchler and his wife concerning matters outside of and foreign to the issues, and in overruling motions to strike out such testimony. It is also contended that the verdict is not sustained by sufficient evidence.

The witness Cook, in his examination and cross-examination, detailed at length the circumstances under which he testifies that the note was signed by Mr. Deuchler. In substance, he testified that he was a salesman for the Columbian Hog & Cattle Powder Company; that Deuchler signed the note in his presence. On cross-examination he testified, without objection, that he had known Deuchler for more than ten years before this transaction, having lived near him and been on particularly friendly terms with him in Richardson county, his former home; that on

the date the note was signed he went to Deuchler's farm in Jefferson county, about three or four miles from Diller, to sell him some stock powder; that he asked Deuchler to represent the company in that territory, and tried to sell him a car-load of stock powder; that he had sold him a small amount the spring before, for which he did not take a note; that he went into the house and made his regular canvass to sell goods; that he carried with him a note book and an order book; that in Mrs. Deuchler's presence he wrote out a note and an order, both of which Deuchler signed, Mrs. Deuchler being in the room when the papers were signed. Plaintiff then introduced the note and rested. The brief of appellant does not point out specifically any errors in the cross-examination of Cook, and does not refer to the pages of the bill of exceptions where they may be found. Taking all of his evidence together, we find no prejudicial error in any ruling of the district court.

Defendant, Deuchler, testified to his former acquaintance with Cook, and that he had bought stock food from him previously, detailed the conversation with Cook up to the time that he says Cook produced an order book, filled out an order blank, and the witness signed it for $1,800 worth of stock food. He denies that he ever saw more than one paper at that time, and asserts that he never signed a note. On cross-examination Deuchler manifested considerable uncertainty when the signatures on the note and on several other documents actually signed by him were shown to him in such a manner as to show nothing of the paper but the portion which contained the signatures, and said that the signature on the note looked very much like his, but that he never signed such a paper.

The contention that the testimony of Deuchler was erroneously admitted with respect to what took place at the time Cook testified the note was signed cannot be upheld. Part of the transaction having been given in evidence, the defendant was entitled to show the remainder as far as it tended to throw light upon the disputed point. This is also true with respect to the testimony of Mrs. Deuchler, which was confined to what took place at the same time.

We find no error, therefore, with respect to the admission or rejection of evidence.

Upon the point that the verdict is not sustained by sufficient evidence, there were circumstances proved which, if believed, warranted the jury in finding that the plaintiff was not a *bona fide* purchaser of the note. The only matter in which there was room for a substantial difference of opinion was as to whether the defendant actually signed the note. The instrument itself is in the record. The signature, when compared with other signatures of his in evidence, seems to the writer to be his genuine handwriting; but, on the other hand, there is the direct testimony of himself and wife to the contrary. We are reluctant to set our judgment on this question of fact against that of the jury, to whom by law the determination of such questions is submitted. We think, therefore, there is sufficient evidence to sustain the verdict.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

WILLIAM R. HOMAN, APPELLANT, V. OAK C. REDICK ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,918.

1. **Principal and Agent:** CONTRACTS: POWER COUPLED WITH INTEREST. Where an office is furnished to an agent employed to manage property and collect rents, rent free, as a part of the compensation for his services, the relation of landlord and tenant does not exist, the occupancy is merely ancillary to the service, and the agent does not take his power coupled with an interest.
2. **Contracts:** PERSONAL SERVICES: TERMINATION BY DEATH. As a general rule a contract for personal services is dissolved by the death of either party.
3. ———: ———: BREACH: LIABILITY OF REPRESENTATIVES. If the contract is so far personal that the representative of one of the

parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not responsible for a like failure.

4. ———: ———: ENFORCEMENT: RATIFICATION BY EXECUTORS. A contract was made that A should manage and control a number of parcels of improved real estate belonging to B for the term of five years, should collect the rents, and make repairs, and pay the money remaining in his hands on the 15th of each month to B. It contained the provision: "That the covenants in this contract shall succeed to and be binding upon the respective heirs, executors, administrators and assigns of the parties hereto." After A had entered upon the performance of his duties, B died, having by will devised the property to his executors and trustees. *Held*, That since such a contract could not be enforced as against the heirs, executors and assigns of A, it was equally unenforceable against the personal representatives of B. *Held*, further, that the fact that the executors permitted A for some time after the death of B to manage the property and collect the rents did not constitute a ratification and adoption of the contract.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Morsman, Maxwell & Thompson and *Will E. S. Thompson*, for appellant.

Francis A. Brogan, contra.

LETTON, J.

Action to recover for breach of a contract for personal services. A demurrer to the petition was sustained and the cause dismissed. Plaintiff appeals.

In substance, the petition alleges that the plaintiff is engaged in the real estate and rental business at Omaha; that John I. Redick in his lifetime was the owner of a large amount of real estate in the city, which was rented to various tenants; that on December 8, 1904, an agreement was made between plaintiff and Redick, whereby plaintiff was employed for five years from January 1, 1905, to look after this real estate, collect the rents, make repairs, pay bills, and have the general supervision of the property, and as compensation for his services he was to receive 3 per cent. of the rents collected and, in addition,

office rent free at 1517 Farnam street, Omaha; that plaintiff under the contract proceeded to take charge of the property and carry out its terms; that the total rentals received during 1904 amount to $29,000. It is further alleged that Redick died on April 2, 1906, leaving a will by which the defendants were constituted trustees and executors of his estate, and the entire title, control and management of the real estate passed to them for the purposes of the trust; that after Redick's death plaintiff continued in charge, control and supervision of the property and collected rents as before, making monthly reports to the trustees until August 1, 1908, when they attempted to cancel the contract, and took the charge, control and supervision of the property away from him, and refused to allow him to collect the rents and compelled him to vacate his office. The amount of money then collectable for rents is alleged; that plaintiff was fully able and willing to continue and carry out the obligations of the contract on his part; that 3 per cent. is below the general and customary fee for such services; that he accepted the contract at that price on account of the length of time it would run and the volume of business; that at the time the property was taken from his control the rent amounted to $5,800 a month; that if the contract had not been broken he would have collected that sum, and his compensation would have been $174 a month; and that his office rent was reasonably worth the sum of $60 a month. He prays judgment for $4,000 as damages. A copy of the written contract is attached. This contains the further agreement "that the covenants in this contract shall succeed to and be binding upon the respective heirs, executors, administrators and assigns of the parties hereto."

Appellant bases his right to a reversal upon three propositions: (1) Under the terms of the contract the plaintiff was vested with an agency or authority coupled with an interest in the subject matter. (2) If the contract did not create an agency coupled with an interest, yet it was binding upon the defendants to the extent that, if they re-

fused to be bound by it and discharged the plaintiff, they were liable in damages. (3) Defendants ratified and adopted the contract.

1. It is a general principle of the law of agency that upon the death of the principal the contract of agency comes to an end, since the agent, who is merely acting for another, cannot act for the principal when he has ceased to exist. This rule, however, is subject to various exceptions and modifications growing out of the facts in each case. It is claimed that the facts alleged with reference to the occupancy of an office, rent free, brings the case within one of these exceptions, for the reason that the agent took the power to act coupled with an interest in the premises by reason of his right to the possession of real estate. The contract recites that the right to occupy the office, rent free, is merely compensation for the agent's services in addition to the 3 per cent. specified. It seems clear that upon the termination of the service the right to occupancy ceased; that the contract did not create the relation of landlord and tenant; and that no interest in real estate passed to plaintiff by reason of the agreement. The relation between the parties was principal and agent, and not landlord and tenant. Contracts for services allowing the occupancy, rent free, of premises to the person employed are very common, and courts generally take the view stated. *School District v. Batsche,* 106 Mich. 330, 29 L. R. A. 576; *Davis v. Williams,* 130 Ala. 530, 54 L. R. A. 749; *McQuade v. Emmons,* 38 N. J. Law, 397. An exhaustive discussion of this point may be found in note to *Bourland v. McKnight & Bro.,* 4 L. R. A. n. s. 698, 707 *et seq.* The real test seems to be whether the occupation of the premises is connected with the purposes of the service and was obtained by reason of the contract for the purpose of facilitating the business of the principal. *Mitchell v. Morris Canal & Banking Co.,* 31 N. J. Law, 99. There is a clear distinction between the facts alleged and the facts in *Volk v. Stowell,* 98 Wis. 385, cited by plaintiff. The defendant in that case was to receive a certain sum per month

besides 15 per cent. of all increase of stock born on the farm, and also 15 per cent. of the farm products, and the court was of the opinion that the contract was somewhat of the nature of a lease and conferred upon the plaintiff many of the rights of a tenant.

2. Is the contract binding upon the executors and trustees to the extent that, if they failed to carry it out, they are liable in damages? The compensation of plaintiff was fixed at 3 per cent. of the amount collected. The contract required him to render a monthly statement to Mr. Redick "showing in detail rents collected, bills paid, and turn over to said first party on the 15th of each month all moneys remaining in his hands at that time belonging to said first party." The compensation for services performed was evidently deducted each month, so that, both at the time of Mr. Redick's death and at the time the trustees refused to allow the plaintiff to continue further to manage the property and collect rents, he had been fully paid for services to that time rendered. The claim in the petition is for compensation which he might have earned under the contract, if he had been permitted to carry it on until the expiration of the five-year period.

The principle which applies is laid down in *Babcock v. Goodrich*, 3 How. Pr. n. s. (N. Y.) 52: "As a general rule, if a contract is so far personal that the representative of one of the parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not so responsible for a like failure, in the absence of evidence of intention to bind the representative. Evidence of such intention may be furnished by the terms of the contract, or implied from its nature." In the present case, would the death of plaintiff have bound his "heirs, executors, administrators or assigns" to carry on the stewardship, or could they insist upon such right against the wishes of the other party? Would a court compel specific performance of the contract upon their part? If these queries must be answered in the negative, and the personal representatives of the plaintiff

would not be bound to perform in case of his death, how can it be said that in case of the death of the other contracting party his representatives are bound? Could it have been the intention of Mr. Redick to entrust the care of his valuable property and the collection of a large sum of money each month to unknown persons, who might perhaps be of doubtful business ability or integrity? Are not the relations so purely personal that the death of either party puts an end to them? Must not the contract be mutual? These questions are discussed in *Lacy v. Getman,* 119 N. Y. 109, 6 L. R. A. 728, and it is held that the death of the servant dissolved the contract, and that the death of the master had the same effect. See, also, note to *Mendenhall v. Davis,* 17 Am. & Eng. Ann. Cas. 179 (52 Wash. 169).

Considered without relation to the agreement in the contract that its terms should be binding upon the representatives of the parties, the death of Redick terminated and dissolved the relation of principal and agent, and no recovery could be had against his executors and trustees for failure to permit the plaintiff to carry on the contract until its expiration. 2 Woerner, American Law of Administration (2d ed.) sec. 328, p. *688; *Kimmell v. Powers,* 19 Okla. 339; *Campbell v. Faxon,* 73 Kan. 675, 5 L. R. A. n. s. 1002. Does the fact of this express stipulation change the situation of the parties? Suppose that Mr. Redick had died intestate and his property had been distributed to a number of heirs, would each of the heirs take it subject to the provisions of the contract? Could they involuntarily be made principals and the plaintiff their agent? Is such a contract in the nature of a charge against an estate so that whoever takes it by descent, or by purchase, takes it burdened with the obligation to employ the plaintiff? Or, in case of plaintiff's death, must the then owners employ his heirs, executors, administrators or assigns to manage the property and collect its revenues? These queries suggest the impracticability of applying such a provision to a contract for services. The very nature of the contract

does not permit of the enforcement of such an agreement. No doubt it may be carried out voluntarily by the consent of the parties; but, in such case, it is virtually the making of a new contract. If the agent dies, the owner of the property may accept as a new agent one of the classes of persons named in this clause; or, if the principal dies, his heirs, executors or assigns may be willing to accept the services of the agent, upon the same terms and conditions as specified in the contract. In such case the person so accepted is vested with authority by virtue of a new relation entered into, and not by reason of the survival of the contract. We have examined the cases cited by the plaintiff upon this point, but we find features in each one which clearly distinguish it from the facts in this case. Where such recovery is allowed, the contract has usually been partly performed without compensation, and has been of such a nature that the peculiar knowledge or skill of the agent has been exerted for the benefit of the estate to such an extent as to increase its corpus or enhance its value, and loss would occur if he had ceased to act. *Wylie v. Coxe,* 15 How. (U. S.) 415, and *Hawley v. Smith,* 45 Ind. 183, are typical cases.

3. What has just been said in the discussion of the second point answers the contention that the defendants, by allowing the plaintiff to continue to collect the rents and manage the property for them for a portion of the time after the death of Mr. Redick, have ratified and adopted the contract. The trustees, by accepting the services of plaintiff, did so, not because they were bound to do so by any provision in the contract, but voluntarily. They allowed him to retain payment for his work to the same extent and in the same manner as specified in the contract. If they had accepted the service and refused to pay, they would have been liable upon an implied contract for the reasonable value thereof. Both parties tacitly seemed willing to consider the terms named in the contract as a proper remuneration. We cannot take the view that the fact that the trustees continued to allow plaintiff to act had the

effect to cause them to ratify or adopt the contract so as to bind the trustees to accept plaintiff's services until the time of its expiration.

The judgment of the district court is

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

CHARLES G. JONES, APPELLEE, V. CHICAGO GREAT WESTERN RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,721.

1. **Railroads:** RECEIVER'S SALE: LIABILITY OF PURCHASER. A decree, requiring the purchaser of a railroad at a receivers' sale to pay, in addition to the bid, all liabilities incurred by the receivers in their operation of the road, includes the damages recoverable in an action at law for personal injuries to one of their railroad employees.
2. ———: ACTION FOR INJURY TO EMPLOYEE: PETITION: SUFFICIENCY. In an action for personal injuries, a petition pleading facts which entitle plaintiff to relief under the doctrine of the last clear chance will not be *held* insufficient on appeal, because the principle of law under which he is entitled to a recovery is not stated.
3. **Trial:** INSTRUCTIONS. An instruction, stating the law applicable to an issue of fact established in plaintiff's favor by the evidence without dispute or contradiction, is not erroneous, because it fails to require a finding on that issue as a condition of granting him relief.
4. **Contributory Neligence:** QUESTION FOR JURY. Where the evidence on a controverted issue of contributory negligence in an action for personal injuries is sufficient to sustain a verdict for plaintiff, the disputed question of fact is one for the jury.
5. **Railroads:** INJURY TO SWITCHMAN: NEGLIGENCE: EVIDENCE. In the switch yards of railroads the speed of an engine on a track upon which switchmen stand at regular times and places daily, pursuant to a known custom, for the purpose of giving signals, may be evidence of negligence where such engine approaches without signal or warning of any kind.

6. **Evidence:** ANNUITY TABLES. In an action for personal injuries resulting in the permanent impairment of plaintiff's earning capacity, annuity tables are admissible in evidence and may be considered by the jury in connection with other competent proofs.

7. **Damages.** A verdict for $16,000 for personal injuries, under the facts disclosed by the record, *held* not excessive.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

William D. McHugh and *W. H. Herdman,* for appellant.

Mahoney & Kennedy, contra.

ROSE, J.

Plaintiff brought this action to recover damages in the sum of $30,000 for personal injuries. From a judgment on a verdict in his favor for $16,000, defendant has appealed.

Plaintiff was the head brakeman and a switchman on a local Union Pacific freight train running regularly between Omaha and Columbus. While he was watching this train as it ran southward on a Union Pacific track at a switch near South Omaha, where he was required to signal the engineer for switching purposes, an engine running backward in the same general direction on the Chicago Great Western track ran against him. He had gone upon that track at the regular time and place pursuant to a daily custom known to a switching crew in charge of the engine which struck him. He was knocked down, but clung to the engine and was dragged beneath it. As a result he lost a foot and three fingers and was severely shocked. At the place of the injury tracks of the two railway systems run side by side in a curve, the Chicago Great Western track being four or five feet west of the nearest Union Pacific track. The side of the cab occupied by the engineer to whom plaintiff gave signals was on the convex of the curve. Plaintiff dropped off his own train and went westward onto defendant's parallel track, where the engineer on the Union Pacific engine was within the line of

vision. In a foreclosure suit brought by bondholders in a circuit court of the United States, the Chicago Great Western Railway Company went into the hands of receivers, January 8, 1908. Plaintiff was injured about 9 o'clock in the forenoon, August 27, 1909, during the existence of the receivership. The property and interests of that corporation and of the receivers were sold to the Chicago Great Western Railroad Company, defendant, August 29, 1909. Plaintiff pleaded facts and adduced proof tending to show, in substance, that he was in the necessary discharge of his duties, acting pursuant to a long-established custom, when injured; that he exercised due care and caution; that there was no negligence on his part; that, while he was giving signals at the time and place mentioned, the receivers, without notice or warning, without ringing a bell or blowing a whistle, with full knowledge of his customary presence, carelessly and negligently backed their switch engine against and over him; that the injury was inflicted in broad daylight when the sun was shining; that the receivers, by the exercise of ordinary care, could have seen plaintiff for a distance of several hundred feet before running him down; that, though the engine which struck him could have been stopped in ten feet, the receivers negligently and wantonly refrained from stopping it, but continued to run it about 142 feet, dragging and crushing him; that the damages which the receivers caused in their railroad operations are recoverable from defendant. The answer, in addition to denying negligence, contains a plea of contributory negligence, and alleges that in becoming the purchaser at the receivers' sale defendant did not incur any liability for injuries to plaintiff.

The first assignment of error is directed to the giving of an instruction containing the following language: "When plaintiff was injured the railroad, which was mentioned in the testimony in this case as the Chicago Great Western Railway was being operated by receivers appointed by the United States circuit court. Shortly after plaintiff's injury said railroad property was, pursuant to a sale made by said United States circuit court and cer-

tain orders and decrees in connection therewith, turned over to the defendant herein, Chicago Great Western Railroad Company as the purchaser thereof. In buying said railroad property the defendant herein, under the orders and decrees of the United States court, obligated itself to pay all liabilities that were incurred by the receivers in the operation of the Chicago Great Western Railway Company. You are therefore instructed that if, under the evidence and instructions of the court, you should find that plaintiff's injuries were inflicted under circumstances that would have entitled plaintiff to recover damages from said receivers of the Chicago Great Western Railway Company, then the defendant herein would be liable to plaintiff for the amount of such damage."

The orders and decrees to which reference is thus made impose upon the purchaser the following obligations:

"As a part of the consideration for the property purchased, the purchaser shall take the property and shall receive the deed therefor upon the express condition that, in addition to the sum bid therefor, the purchaser shall pay and discharge all the following claims which are not paid by the amount bid: * * * (a) All indebtedness, obligations or liabilities which by such receivers shall have been contracted or incurred in the operation or on account of the property of the said Great Western Company at any time before the same shall have been delivered to the purchasers, or in the discharge of their duties as receivers at any time before they are finally discharged. * * * The purchaser shall pay any of the claims described in clauses 'a' and 'b' which are established or unquestioned, and any disputed claims when allowed by the master, without objection, or by the court, and they shall pay to the master or into court the moneys required to discharge the same from time to time as the court may direct."

It is argued that the instruction is erroneous, because defendant, in purchasing the property of the Chicago Great Western Railway Company and of the receivers on the terms fixed by the decrees and orders of the federal court,

did not incur any liability to plaintiff for the injuries pleaded in the petition. Defendant states its position as follows: "Under the plain language of the decree of sale defendant assumed and agreed to pay, first, claims which are unquestioned or established; and, second, any disputed claims when allowed without objection by the master or by the court. As to disputed claims defendant's assumption of payment thereof was conditional on the same being first allowed by the master, without objection, or by the court." It is asserted by defendant that plaintiff's claim is not within either class.

On the other hand, plaintiff takes the position that the last clause quoted from the decree does not impose a condition of liability, but merely sanctions an equitable remedy which is not exclusive, and insists that damages caused by the receivers in the operation of the railway are recoverable in an independent action at law against the purchaser.

The decree on its face shows that payment of the bid is not the full measure of the purchaser's liability. Provision is made in direct terms for the payment of other liabilities and obligations. Is plaintiff's claim one of them? In the management of the railroad the liabilities created by the receivers, except for individual or personal misconduct, were official, and a valid claim or a judgment against them in their representative capacity is in effect a liability against the property under their control. In directing receivers the federal courts keep these principles in mind. It will not be presumed, in construing a decree directing a sale by receivers, that the federal court intended to relieve railroad property from a lawful and just claim growing out of the operation of the railroad while in their hands. Such claims may exist at the time of the sale, though there has not yet been an opportunity to adjudicate or to allow them in any judicial proceeding. Under the orders of the court the earnings of the carrier may be put into improvements, while liabilities created by the receivers remain unpaid. The decree was not intended to wrong those having legal claims or to devise means for re-

leasing corporate property from just burdens. The methods of adjustment provided by the court of equity were not intended to be exclusive. Remedies at law were not cut off. The terms of the decree show a purpose to hold the purchaser responsible for liabilities incurred by the receivers in the operation of the railroad. These observations are in harmony with the decisions of the federal courts and are prompted by justice and the integrity of judicial proceedings wherein railroad property is managed and sold by receivers. *Hanlon v. Smith,* 175 Fed. 192; *Thompson v. Northern P. R. Co.,* 93 Fed. 384. In these respects the trial court, therefore, did not err in giving the instruction criticised by defendant.

The next assignment of error challenges an instruction submitting to the jury an issue as to the right of plaintiff to recover damages under the doctrine of the last clear chance. Defendant insists that facts authorizing a recovery based on that rule of law are not pleaded, and that therefore the trial court erroneously submitted an issue not tendered by the pleadings. On the record presented the point is too narrow and technical. That issue was tried. There was evidence on both sides. While plaintiff in his petition did not plead in legal phraseology the principle on which he seeks relief, he pleaded facts showing that he was negligently injured after his peril had been discovered. The grounds on which plaintiff sought relief were not only understood by defendant and tried by the parties, but the facts on which plaintiff based his right of recovery were stated in the petition. For these reasons, the assignment is overruled.

Further argument is directed to the point that the trial court erred in permitting a recovery under the doctrine of the last clear chance after plaintiff was struck, without requiring a finding that the switching crew on the Chicago Great Western track had actual knowledge of that fact. Such actual knowledge was shown by defendant's witnesses without dispute or contradiction, and a statement to that effect to the jury would have been proper. It follows that defendant was not prejudiced by the instruc-

tion assailed, and that reversible error in this particular is not shown.

An instruction on the duty of plaintiff to look and listen before going onto defendant's track and on the law applicable to proof of contributory negligence on his part is also criticised as erroneous. On those subjects the trial court, among other things, said:

"As to just what time he should look and listen before going on the track is for you to determine from all of the facts and circumstances in evidence before you. In this case if you believe from a preponderance of the evidence that plaintiff did not take such precautions as to his own safety as an ordinarily prudent person would have done under like circumstances and surroundings, and if you further find that such failure on the part of plaintiff caused or contributed to his injury, then you should find that he was guilty of contributory negligence. If, on the other hand, you believe that he did take such precautions as to his safety as an ordinarily prudent person would have done under like circumstances and surroundings, then you should find he was not guilty of contributory negligence."

In this connection defendant assigns error in the refusal of the trial court to give the following requested instruction:

"Plaintiff, in going upon the track of the defendant company without looking for the approach of the engine after he dropped off his train at the main-line switch, was guilty of negligence."

Whether there was error in these rulings depends upon the evidence. There is proof tending to show: Plaintiff dropped off his engine at what is called the "inside switch," lined it, climbed onto a ladder on the side of one of the cars of his train while it was running southward, rode about 125 feet to a place described in the record as the "main-line" switch, again dropped off and went upon the Chicago Great Western track to give signals at the place of the injury. This was a repetition of what had occurred regularly at the same hour for a long time. The custom was

familiar to the switching crew on the Chicago Great Western engine. When plaintiff was injured his attention was directed to his own train, it being his duty to signal the engineer thereof when the last car passed over the main-line switch. When he got off at the inside switch he looked and saw no engine on the Chicago Great Western track, though he could see backward along it 300 or 400 feet. While he was clinging to the ladder he again looked, with the same result. At the main-line switch his train was running five or six miles an hour. The distance from the place where he alighted at the main-line switch to the center of the Chicago Great Western track, where he was struck, was about twelve feet. The engine which struck him was backing southward as fast as 12 or 15 miles an hour and ran 152 feet after the collision. There is evidence from which a higher rate of speed may be inferred. Of the approach there was no warning by bell or whistle. Plaintiff's own train necessarily made considerable noise. From the circumstances narrated, when considered in connection with other proofs, it may fairly be inferred that plaintiff looked for an approaching engine a few seconds before he went upon defendant's track, and saw none. Though the evidence is conflicting in many respects, there is proof tending to establish the facts narrated. It follows that the evidence is sufficient to sustain a finding that plaintiff was not guilty of contributory negligence. That issue, therefore, was properly submitted to the jury, and the rulings of the court thereon were not erroneous.

The trial court refused, on request of defendant, to give an instruction that a speed of 12 or 15 miles an hour was not unreasonable or excessive, and that the jury had no right to find defendant guilty of negligence solely on proof of that rate of speed. This ruling is also assigned as error. The point is not well taken. There is testimony which, if believed, tends to show that the engine on the Chicago Great Western track ran faster than 12 or 15 miles an hour. Besides, the custom, facts and circumstances proved made the requested instruction, in the form submitted to the trial judge, inapplicable to the condi-

tions existing in the switch-yards at the time and place of the injury. Other rulings in refusing instructions are criticised, but they do not contain prejudicial error.

Another assignment of error presented is the admission in evidence of annuity tables issued by the National Life Insurance Company. The judgment cannot be reversed on this ground. It was shown by other proofs that plaintiff was 36 years old at the time of the collision and that he was permanently injured. His expectancy of life and his earning capacity before and after the injury were also shown. It is a well-established rule of evidence that, in an action for personal injuries resulting in the permanent impairment of plaintiff's earning capacity, annuity tables may be admitted in evidence and considered by the jury in connection with other competent proofs. *Vicksburg & M. R. Co. v. Putnam,* 118 U. S. 545; *Baltimore & O. R. Co. v. Henthorne,* 73 Fed. 634; *McKeigue v. City of Janesville,* 68 Wis. 50; *Reynolds v. Narragansett Electric Lighting Co.,* 26 R. I. 457; 17 Cyc. 422. Defendant asserts, however, that the document introduced by plaintiff shows the prices at which the National Life Insurance Company offers annuities for sale, without proof that such prices are fair and reasonable, and draws the conclusion that the evidence was erroneously admitted. According to the proofs applicable to this question, the tables introduced in evidence show the lowest rate at which annuities can be purchased. They were therefore at least as favorable to defendant as rates proved according to the standards demanded by it. When all the testimony relating to these tables is considered, error in admitting them does not affirmatively appear.

Under the final assignment of error the verdict for $16,000 is vehemently assailed as excessive, but the reasons urged by defendant for setting it aside on that ground do not seem to be sufficient to warrant an interference with the work of the jury. There is no definite rule for measuring some of the damages inhering in the verdict. The injuries inflicted by defendant were distressing, and the amount allowable for pain and suffering cannot be com-

puted on any exact basis. Plaintiff was 36 years old, and it cannot be asserted that the prospect of increasing his earnings had passed. Whether his physical condition as indicated by the evidence gave promise of a longer life than the expectancy shown by mortality and annuity tables is a perplexing problem on appeal. He lost time and incurred expenses when he was helpless. The evidence is sufficient to sustain a finding that his earning capacity was at least $1,200 a year before he was injured and not over $400 a year at the time of the trial. The jury may have found that his earnings would have increased, except for his injuries, and that hereafter they will decrease. When all of the damages are considered in connection with the discretion of the jury in measuring indefinite though substantial elements of recovery, where there is no exact method of computation, excess in the verdict is not affirmatively shown.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JOHN PREDIGER, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,843.

1. **Trial:** VERDICT: INSTRUCTIONS. Where a verdict does not disregard an instruction, when interpreted with the entire charge, it will not be set aside on appeal merely because it may seem to be inconsistent with an isolated paragraph.
2. **Master and Servant:** INJURY TO SERVANT: ACTIONABLE NEGLIGENCE. In an action for personal injuries, a foreman's peremptory order to an employee in a trench to raise alone with his hands the end of a heavy iron pipe may be given under such circumstances as to amount to actionable negligence.
3. **Negligence:** QUESTION FOR JURY. Issues of negligence are questions for the jury, where the evidence is sufficient to sustain a verdict in favor of plaintiff.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

C. S. Allen and *O. B. Clark*, for appellant.

Wilmer B. Comstock and *H. A. Reese, contra.*

ROSE, J.

The action is one to recover damages in the sum of $10,000 for personal injuries. Plaintiff and others in the employ of defendant were engaged in laying a line of pipe in a trench. Beginning at defendant's power-house three separate pieces of the pipe, each at least 16 feet long, were laid lengthwise and united at the ends by flanges and bolts. While plaintiff was in the trench attempting alone to lift with his hands the open end of the pipe he was severely injured. The negligence imputed to defendant arises from alleged acts of its foreman in peremptorily ordering plaintiff, under the existing circumstances, to lift a weight which was too heavy for him, and in threatening to discharge him, if he did not proceed to do so, though plaintiff had previously said the pipe was too heavy for him to lift, and had asked without avail for permission to use a lever. The answer contained a general denial and a plea of contributory negligence. Assumption of risk was also pleaded as a defense. The reply was a general denial. From a judgment on a verdict in favor of plaintiff for $2,872.25, defendant has appealed.

A reversal is asked on the alleged ground that the jury disobeyed an instruction that the foreman, "If he had seen plaintiff voluntarily lift the pipe, just before the accident occurred, a distance of six inches, he would be justified in directing him to lift it again an inch or two higher." Defendant insists that the testimony of plaintiff shows that he had once willingly lifted the pipe immediately before he was hurt, and that therefore the verdict in his favor was a violation of the instruction mentioned. An instruction immediately following the language quoted modified it and directed the attention of the jury to testimony that plaintiff, after first having lifted the pipe, told the fore-

man it was too heavy for one man, and asked permission to use a lever, but was ordered to lift it with his hands on penalty of dismissal. The entire charge left the question of negligence, under all of the circumstances, to the jury. When the instructions are considered as a whole, as they should be, the verdict is not contrary to any one of them.

The judgment is also assailed on the ground that the verdict is not sustained by sufficient evidence. It is contended by defendant that plaintiff had already safely lifted the pipe; that by the exercise of ordinary care he could have repeated the task without injury to himself; that he was accustomed to lifting, but failed to take the proper position; that he did not prepare the ground under his right foot for a heavy lift; that the weight of the pipe, as shown by the evidence, was not beyond his strength; that he assumed the risk and was injured through his own negligence. It does not necessarily follow from the evidence that the weight, when plaintiff first lifted the open end of the pipe, was the same as when he again attempted to lift it. After it had been raised six inches at the open end it was not level. It may fairly be inferred from the proofs that it would require greater strength to raise it higher on account of the increased rigidity of the flanges uniting it at the other end. There is proof tending to show: The walls of the trench were uneven. Under plaintiff's right foot there was loose earth which gave way. The weight was too heavy for one man to lift. It was heavy enough for two or three men. Plaintiff had already lifted the pipe six inches, and had asked the foreman without avail for permission to use a lever. The trial court submitted to the jury requests for special findings in answer to the following questions:

"1. After lifting the iron pipe the first time, did the plaintiff tell the foreman, in substance, that it was too heavy for him to lift?

"2. Did the defendant's foreman tell the plaintiff, in substance, to lift the iron pipe or quit and go home?"

The jury answered both in the affirmative, and the findings are sustained by the evidence. Under the circumstances shown by the proofs, the issue of negligence was a question for the jury, and their verdict is amply sustained by the evidence.

Further criticisms upon the giving and the refusing of instructions are sufficiently met by the discussion of the evidence and the law applicable thereto. Complaint of the verdict as excessive is clearly without merit.

AFFIRMED.

REESE, C. J., not sitting.

SEDGWICK, J., concurring.

I concur in the conclusion, but I do not think that the instruction, "If he had seen plaintiff voluntarily lift the pipe, just before the accident occurred, a distance of six inches, he would be justified in directing him to lift it again an inch or two higher," is consistent with the charge as a whole. Under that instruction and the evidence the jury must have found for the defendant. The instruction, however, is wrong, and is absolutely inconsistent with the whole charge, and the jury did right in disregarding it.

HAMER, J., concurs in the above.

EASTERN BANKING COMPANY V. EPHRAIM W. ROBBINS, APPELLANT; DOMINICK PROHASKA ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,871.

1. **Mortgages**: FORECLOSURE SALE: EXHAUSTION OF REMEDY. For the purpose of collecting the amount due on a real estate mortgage, mortgagee's equitable remedy by foreclosure, in absence of a deficiency judgment, is exhausted by a valid judicial sale of the mortgaged property under a decree foreclosing the mortgage.

2. ———: FORECLOSURE: DEFICIENCY JUDGMENT. After realty has been sold under a decree foreclosing a first and a second mortgage thereon, the junior mortgagee is entitled to a deficiency judgment for any unpaid debt due on his mortgage, and this remedy is

not lost, because the entire purchase price at the judicial sale was applied to prior liens.

3. ———: ———: REVIVOR OF DECREE. A decree foreclosing a mortgage on realty is not a judgment subject to revivor after the mortgaged property has been legally sold and the sale duly confirmed under a decree of foreclosure.

4. ———: ———: DEFICIENCY JUDGMENT. On the ground of laches a court of equity may decline to enter a deficiency judgment in a suit to foreclose a mortgage on realty, where that remedy was open and uninvoked without excuse for more than 14 years after the property had been sold under a decree of foreclosure.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

M. A. Hartigan, for appellant.

John M. Ragan, contra.

ROSE, J.

In form the petition appears to be an application for the revivor of a judgment. The material facts established by the record without dispute are: The Eastern Banking Company commenced a suit in the district court for Adams county, December 15, 1896, to foreclose the first mortgage on a tract of land; Dominick Prohaska and wife being mortgagors and defendants. In the foreclosure suit the petitioners herein, Ephraim W. Robbins and wife, had been joined as defendants, and they filed a cross-petition for the foreclosure of a second mortgage on the same land, their codefendants being the mortgagors. The cross-petition contained a prayer for the sale of the mortgaged land, for the payment of prior liens out of the proceeds of the sale, for the application of the surplus to the indebtedness secured by the second mortgage and for a deficiency judgment for any unpaid balance. Under a decree of foreclosure the mortgaged land was sold and the proceeds applied to the costs, the taxes and the debt secured by the first mortgage. There was no surplus to apply on the second mortgage, the debt amounting to $1,015.95, with 8 per cent. interest per annum from March 5, 1897, no part of which

has been paid. The foreclosure sale was confirmed March 10, 1898. Petitioners in the present proceeding never recovered the deficiency judgment for which they had prayed in their cross-petition in equity, but filed, June 17, 1912, their petition for the revivor of the executed decree of foreclosure, more than 14 years after the judicial sale thereunder had been confirmed. The trial court refused to revive the executed decree of foreclosure, and they have appealed.

Did the trial court reach the right conclusion? Petitioners are demanding equitable relief in some form. Are they defeated by laches? The suit to foreclose the mortgage afforded a remedy by seizure and sale of the mortgaged land to pay the debt owing to petitioners herein. The decree of foreclosure was not a lien on any other property. An execution thereon to seize other property of mortgagors could not legally have been issued. There was no personal or general judgment against them in favor of petitioners. The remedy of the latter under the decree was exhausted by the judicial sale of the land on which they had a lien.

The statute gave petitioners herein a remedy by means of a deficiency judgment against mortgagors personally or generally. This remedy was available to them as early as March 10, 1898, "on the coming in of the report of sale." Rev. St. 1913, sec. 8256. Notwithstanding their prayer for a deficiency judgment in the foreclosure suit, they did not invoke or obtain such relief "on the coming in of the report of sale," or at any subsequent time. That the proceeds were insufficient to pay any part of the debt due on the second mortgage did not defeat their right to a deficiency judgment. The statute granted the trial court power "to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises." Rev. St. 1913, sec. 8256. It would be trifling with statutory terms to hold that mortgagees were not entitled to a deficiency judgment because no part of the proceeds of the sale of the mortgaged premises could be applied to the second mortgage. The legislature made provision for a

remedy, and it applies where the entire debt remains unpaid after a foreclosure sale, as well as where there is a partial payment by that means.

After the remedy by foreclosure was exhausted without payment of any part of the debt due on the second mortgage, no personal or general judgment subject to revivor remained.

The granting of the relief demanded in the petition for a revivor would require the entry of a deficiency judgment for the amount due petitioners after the remedy had been open to them more than 14 years. During that time no effort was made to invoke this remedy. On the face of the record the delay is inexcusable. Petitioners are defeated by laches. In this case a court of equity in the exercise of its inherent power to deny relief on account of laches, independently of the statute of limitations, should refuse to enter a deficiency judgment. *Hawley v. Von Lanken,* 75 Neb. 597. Referring to the power to perform the act of entering a deficiency judgment after expiration of the term at which the judicial sale was confirmed, it was remarked in *Sawyer v. Bender,* 4 Neb. (Unof.) 304: "We think that the power to perform it would not lapse until the obligation, if valid, should be satisfied or become barred by the statute of limitations." This expression, however, is dictum in an unofficial opinion and is not binding as a precedent. There is nothing to revive, since a deficiency judgment should not be entered on account of laches. For these reasons the proceeding was properly dismissed.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JOHN W. KANALY, APPELLANT, V. ORA BRONSON, ALIAS ORA KANALY, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,874.

1. **Marriage:** ANNULMENT: EVIDENCE. In a statutory proceeding to annul a marriage on the ground that "the consent of one of the parties was obtained by force or fraud," evidence proving that there was "no subsequent voluntary cohabitation of the parties" is essential to plaintiff's case. Comp. St. 1911, ch. 25, sec. 2.
2. **Appeal:** AFFIRMANCE. A proper judgment under the pleadings and the evidence will not be reversed on appeal, merely because the trial court did not give the right reason for the decision.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

A. F. Moore, for appellant.

ROSE, J.

This is a statutory proceeding to annul plaintiff's marriage to defendant on the ground that it was procured by force or fraud. The ceremony was performed in Sioux City, Iowa, January 29, 1912, when plaintiff was a resident of Havelock, Nebraska. Defendant entered her voluntary appearance in the case, but made no defense, and was not present in person or represented by counsel at the trial. Plaintiff testified, among other things, that a minister from Sioux City accosted him at Havelock in presence of the city marshal and told him he would have to go back to Sioux City or go to the penitentiary, and that under threats of this nature the ceremony was performed. The trial court declined to grant plaintiff any relief and dismissed the proceeding. He has appealed.

The correctness of the decree depends upon the evidence. In addition to showing that the consent of plaintiff to the marriage "was obtained by force or fraud," he was required to prove that there was "no subsequent voluntary cohabitation of the parties." Comp. St. 1911, ch. 25, sec.

2. The testimony of plaintiff himself shows that he voluntarily returned alone to Havelock after the marriage ceremony had been performed, that defendant came later, and that they cohabitated together there for a few days. In attempting to show by his testimony that he did not cohabit with her within the meaning of the statute, he gave the following reasons for his cohabitation: "It was because I did not know the law at that time, and they said it was the law and I thought I had to," and "I was threatened with being sent to the penitentiary, for not doing as a man should towards supporting her." When or by whom this threat was made is not shown. There was no attempt to repeat any threatening language which coerced him into cohabiting with defendant. He does not intimate that she personally threatened him. The testimony as to the threat on this branch of the case is a conclusion. He was 29 years old and had previously been divorced. Defendant was 22. There is no evidence that he made any protest against cohabiting with her, or cried for help or called upon friends or counsel for advice, or that he did not have time or opportunity to do so. The state is interested in the marriage relation, and courts of equity in administering the law are not obliged to accept testimony of this nature as sufficient proof that admitted cohabitation after marriage was involuntary, within the meaning of the statute authorizing the annulment of marriages. For insufficiency of the evidence in this respect the proceeding was properly dismissed.

The trial court gave a different reason for the decision below; but, since his judgment is free from error, the reason given for rendering it is immaterial on appeal.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

GIRARD TRUST COMPANY, APPELLEE, V. HENRY NULL ET AL.; W. V. HOAGLAND, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,878.

1. **Judgment:** MODIFICATION AFTER TERM. The statutory remedy for correcting a judgment after expiration of the term at which it was rendered is limited to the grounds enumerated in the statute. Code, sec. 602 (Rev. St. 1913, sec. 8207).
2. ———: ———. A motion to correct a decree by allowing interest at 10 per cent. per annum after maturity of the debt, instead of a lower rate for that period, as originally fixed by the trial court, should be overruled on a record showing that the decree was entered as pronounced; that the term at which it was rendered was allowed to pass without any effort to correct it; that it had been affirmed by the supreme court; that there had been no attempt to correct the error on appeal; that the journal entry of the decree disclosed no error in the rate of interest; that the motion required a judicial inquiry into evidence outside of the decree itself.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

Hoagland & Hoagland and *W. B. Comstock,* for appellant.

Albert Muldoon, contra.

ROSE, J.

The purpose of the appeal is to reverse an order correcting a decree. The suit was brought to foreclose a mortgage. In the entry of the decree, which was in favor of plaintiff, the unpaid debt with the interest due, as computed by the trial judge and as stated in his findings, was $986. From a decree of foreclosure to collect that sum, defendants appealed to the supreme court. An affirmance followed. After the mandate had been received below, the affirmed decree was, on a motion by plaintiff, changed by the district court at a subsequent term to show that the amount due plaintiff was $1,127.97 instead of $986, as origi-

nally decreed. The increase is the difference between interest at the rate of 7 per cent. per annum for the entire period and that rate until maturity of the debt, with interest after maturity at the rate of 10 per cent. per annum until the date of the decree. From this modification defendant W. V. Hoagland prosecutes the second appeal in this case.

Plaintiff attempts to justify the modification after expiration of the term at which the decree was rendered, on the ground that the trial court had statutory power to make the correction: "For mistake, neglect, or omission of the clerk." Code, sec. 602 (Rev. St. 1913, sec. 8207). On this proposition it is argued that a clerical mistake of a judge in computing interest is similar to that of a clerk, and that power to correct an error of either exists, even after the erroneous judgment has been reviewed and affirmed by the appellate court. It is well settled by repeated decisions that relief under the statute cited is limited to the grounds enumerated therein, and that the statutory remedy does not extend to errors of law or to judicial acts. *Dillon v. Chicago, K. & N. R. Co.*, 58 Neb. 472; *Ackerman v. Ackerman*, 61 Neb. 72; *Hitchcock County v. Cole*, 87 Neb. 43; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385.

On the face of the decree, as it appears on the journal of the district court, error in the amount of interest recoverable does not appear. Neither the note nor the mortgage is copied on the journal. The entry made thereon contains nothing to indicate that interest was payable at an increased rate after maturity. Plaintiff does not assert that the clerk made any mistake. The decree of foreclosure includes an opinion of the presiding judge, findings of fact, and the final order itself. It expresses without omission the entire judicial action taken at the time it was rendered. Plaintiff could have asked the trial court to make the correction any time before expiration of the term at which the decree was rendered, while jurisdiction for that purpose existed. The mistake was subject to correction in the appellate court on cross-appeal. There

was no clerical error in computation. Plaintiff's motion presented a judicial inquiry into the rate of interest mortgagors had agreed to pay after maturity of the debt. The determination of that question required the trial judge to go beyond his former findings and judgment and to consider evidence not appearing in his minutes or on the journal. At the proper time, plaintiff should have either presented a form of decree or have examined the one rendered. In these respects the trial court was entitled to plaintiff's assistance. The power to correct a journal entry to record the judgment actually rendered is not involved. The error in controversy was not within the enumerated remedies created by the statutory provisions invoked by plaintiff.

The modification of the affirmed decree is therefore reversed and plaintiff's motion overruled.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

MCLAUGHLIN BROTHERS, APPELLANT, V. BENJAMIN W. HILLIARD ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,856.

Appeal in Equity. "Where the examination of the record on appeal in a suit in equity leaves an appellate court in doubt as to the equities between the parties, the doubt depending solely upon the credibility of material witnesses who testified orally upon the trial, such doubt will, ordinarily, be resolved in favor of the correctness of the judgment of the trial court." *Langmann v. Guernsey*, 95 Neb. 221.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Morning & Ledwith, for appellant.

Claude S. Wilson and *Hainer & Craft, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Lancaster county, to foreclose a mechanic's lien for lumber furnished defendant Mellor, a contractor, and used by him for the improvement of a dwelling-house belonging to defendant Hilliard. During the trial defendant Mellor brought into court $60 and tendered the same to plaintiff, which tender was refused. The findings were in favor of defendant Hilliard, and as to him plaintiff's lien was canceled and his petition dismissed. The court found due from defendant Mellor to plaintiff $56.30, and ordered that the same be paid to plaintiff out of the money which had been deposited by Mellor. Plaintiff appeals.

It is not disputed that plaintiff furnished the material for which relief is sought, nor is there any dispute that Mr. Hilliard paid the contractor in full. The case turns upon the credibility of the witnesses as to a certain check for $622.34, given by Mellor to plaintiff. When this check was given, Mellor informed plaintiff that he did not then have money in the bank to pay the check, and requested that it be held until a date named. On that day the check was deposited by plaintiff in its bank, and shortly thereafter was returned to plaintiff, not paid for want of funds. Mellor's attention was called to the fact that his check had been dishonored. He testifies that about two days later he went to the office of plaintiff and paid to the secretary (who was also treasurer) the $622.34 in cash and obtained the return of his check. The secretary positively denies that any such payment was made. He testifies that the check was taken up on October 5 by the payment by Mellor of $250 in cash, and the giving of another check for $372.34, which check was post-dated October 25. Mellor positively denies that he paid $250 in cash either at that or any other time, and explains the giving of the check for $372.34 as follows: "I said: 'Here is a check for $372.34; $11.34 to apply on the Conway job, and the balance on the Hilliard job.' " On the back of the check was noted in pencil: "Conway & 1305 N 25." "1305 N 25" is shown to have meant 1305 North Twenty-fifth street, which is the

property upon which Mellor was doing the work for defendant Hilliard. We have examined and re-examined the record, in an effort to determine which of these two witnesses is the better corroborated by the other evidence in the case, but we are unable to decide that question. There are some circumstances shown which seem to corroborate the secretary, and others which seem equally to corroborate Mr. Mellor. In such a state of the record, we have no alternative but to apply the rule announced in *Langmann v. Guernsey,* 95 Neb. 221, where we held: "Where the examination of the record on appeal in a suit in equity leaves an appellate court in doubt as to the equities between the parties, the doubt depending solely upon the credibility of material witnesses who testified orally upon the trial, such doubt will, ordinarily, be resolved in favor of the correctness of the judgment of the trial court."

We believe that rule to be sound, and, being unable from the cold record before us to determine the question of credibility of the witnesses in this case, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

FRITZ SCHWEPPE, APPELLEE, V. HENRY UHL ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,897.

1. **Torts: JOINT AND SEVERAL LIABILITY.** An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.
2. **Highways: OPERATION OF AUTOMOBILES: CONCURRENT NEGLIGENCE.** Evidence examined, and set out in the opinion, *held* sufficient to establish concurrent negligence on the part of the defendants, which rendered them jointly and severally liable therefor.

APPEAL from the district court for Otoe county: RALPH W. HOBART, JUDGE. *Affirmed.*

Livingston & Heinke, for appellants.

H. G. Wellensiek and *Paul Jessen, contra.*

FAWCETT, J.

From a verdict and judgment of the district court for Otoe county, awarding plaintiff $261.50 damages for the negligent and careless operation of automobiles owned by defendants, defendants severally appeal.

The petition alleges, in substance, that on August 18, 1911, plaintiff was traveling along a public highway driving a team of horses attached to a wagon; that while so traveling, and at a narrow place in the road, the defendants approached him from the rear, each driving an automobile; that as they approached they carelessly and negligently sounded horns and made unusual and unnecessary noises with their automobiles and other instruments; that they were each traveling at an excessive rate of speed, to wit, 15 miles an hour; that as they approached from the rear, making the noises and confusion noted, and at the rate of speed stated, plaintiff's team became frightened, and he requested defendants to cease said noise and reduce their speed until he could get his horses under control and reach a point of safety; that defendants each disregarded his request and ran their automobiles by his team in a careless and negligent manner, at a place where the same was approaching a bridge and where the road was too narrow to allow plaintiff to turn out; that each of defendants in passing turned into the road immediately in front of plaintiff's team and less than 30 feet therefrom; that, by reason of the careless and negligent acts of defendants, plaintiff's team became frightened and unmanageable and ran away, throwing plaintiff out and permanently disabling his right arm; that in all of such acts defendants were acting in concert and their automobiles formed a part of one procession. Defendants answered separately, by general denial.

The grounds upon which defendants assail the judgment are: (1) That the evidence shows there was no concert

of action in the acts of negligence alleged to have been committed, nor any concurrent negligence at the different intervals of time when the several automobiles passed plaintiff; that, regardless of the acts of negligence by the defendants who owned the first five cars that passed, plaintiff suffered no injury or damage resulting therefrom; (2) that defendants were lawfully upon the road; that there was no concert of action or common purpose or understanding to injure plaintiff, or to do the negligent acts complained of, shown; that no one of defendants had authority over the others to direct their movements; that if negligent acts were committed, as alleged, they were several and individual, and not joint; (3) that a joint tort is necessary to the maintenance of a joint action; and (4) that the court, on the questions of law reserved at the time the verdict was received, should have entered judgment for the defendants. It will be seen from this statement that the sole question to be determined is: Are the defendants jointly liable for their wrongful acts, which the evidence clearly shows caused plaintiff's injury?

The evidence shows that on the day in question the defendants, with a number of other persons, in 16 automobiles, formed a procession at the town of Talmage, and proceeded from there, in procession, to several adjoining towns. The purpose of this tour was to advertise the town of Talmage, and especially a picnic which was to be held at that place within a few days thereafter. The trip was prearranged, the details thereof provided for, and defendants, with the other persons who accompanied them, participated in all the matters in relation thereto. They formed a procession and proceeded as such during the entire trip after leaving Talmage until after the occurrence upon which this action is based. The several cars which comprised the procession moved in the same direction, at the same time, at substantially the same rate of speed, for the same purpose, and with the same end in view. The car of defendant Uhl headed the procession. Second came the car of Henry Bischof, who was made a defendant in the action, but in whose favor a verdict was di-

rected, so that he is no longer in the case. Then came the cars of defendants Gritzka, Kuse, Young, Kohrs, and Ritter, in the order named. When the procession left the town of Syracuse, it proceeded south toward the next town on its schedule, as previously arranged and agreed upon. The procession in the order named overtook, the first six cars passed, and the seventh attempted to pass, plaintiff at a point near to a bridge across the Nemaha river. It is clearly established that the procession moved with unusual noise, and that nothing was done by the defendants, or any of them, to avoid danger from frightening plaintiff's team as they passed him. Plaintiff testified that, when the first car came up to him, "they said give them some more road; there is 16 more coming. And I said, 'You better stay back and let me cross the bridge, and then I will give you more room.' It was plowed around, and there was no chance at all so I could get out of the way." He further testified that they did not "stay back," but went on by; that as the first car went by it turned back into the road so abruptly that he had to jerk the team quickly to the right or it would have been struck by the car; that when this happened his horses "looked up and got kind of scared. They didn't run. I got control of the horses that time." When asked how far ahead of him they turned back into the road, he answered that the first one turned "just as close as he could, and the rest of them did that, too." He fixed the distance ahead of his team at which the first car turned back into the road at less than five feet, and the rest at less than ten feet. After testifying as to the first car, he was interrogated about the others, and answered: "Well, I know about four cars; that is what I know that passed. I held my horses all right then, because they were getting scared from the first time on; but I held them all right. And then, after that, they got scared so much they started at a gallop; and just as soon as they started out they made more noise, the automobiles did, than they did before." He further testified that, after the horses started to run, he knew of at least one car that passed him; "and then, after that, that

one car came behind, and the team run just as fast as the car then, and I didn't have any control of the team, and I couldn't hold them at all, and they run to the Nemaha bridge. And when the wagon struck the bridge it broke the axle on the wagon—it was a new wagon—and broke the coupling pole, and the team run off with the front part of the wagon, and the box tipped over nearly on top of that bridge and upside down, and I laid under it. I was all under the wagon bed except my arm, and I had the wagon bed on my elbow on the bridge. Q. Now, at the time that your team was running, as you have told the jury, you may state whether or not there was any car on the side of you racing with you on this road? A. Well, a short time there was a car with me, together, and the team and the car one of them runs just as hard as the other. The team got ahead and the car stayed behind. * * * Q. While you were racing along with this car, what noises, if any, did you hear back of you? A. Well, I don't know what it was besides the horns, but they made some noise besides the horns they had on the cars. Q. Were they making lots of noise? A. Yes." He then testified as to the good disposition of his horses. He further shows that there was a ditch on his side of the road, so that he could not turn out farther than he did. He then shows that he had ridden in automobiles and watched the speedometers, and that in his judgment the cars that passed him were running from 20 to 25 miles an hour.

Herman C. Gruenther, a young man 20 years of age, was called as a witness. His testimony shows that he was traveling along this road with a motorcycle; that he had some trouble with this motorcycle, and had stopped for the purpose of putting it in order; that while he was there plaintiff passed, driving his team; that within five minutes thereafter "the Talmage boosters" came along; that when they passed him they were making a noise with rattles, horns and whistles; "they made all kinds of noise;" that they were blowing horns with their mouths, in addition to blowing their automobile horns; that their mufflers were off, and they were making so much noise as they passed

he could not hear the noise of his own motor; that they were running "25 to 30 miles an hour anyway;" that after they had passed he heard a different noise, "or a scream of some kind;" that he looked up and saw the team and wagon were having trouble, with the cars racing side by side; that they were not very far from the big bridge; that he watched the team until it reached the bridge; that when the team struck the bridge the man was thrown out, and then the cars stopped.

It is needless to quote any more of the testimony. It is very clear that the defendants, not only carelessly, but recklessly, passed the plaintiff when he was in a place of danger, at a high and reckless rate of speed. According to the plaintiff, instead of stopping the noise, they made more as they drove by. The evidence shows that plaintiff's horses were not easily frightened. It is clear that, even with the noise the cars were making, no one of them, passing as they did, would have caused the runaway; but, rushing by as they did, one after another, in rapid succession, proved to be too great a strain for even this reliable team. The horses "looked up and got kind of scared" as the first car whizzed by. They became more and more frightened as each succeeding car passed, until the strain became more than they could bear, and when the seventh car attempted to pass their fright reached a point where plaintiff was unable to longer control them. This result was, therefore, not caused by the single act of any one of the defendants, but by the combined acts of all. Their actions show a disregard for the rights, and even the life, of the plaintiff, for which the jury held they should answer, and they should consider themselves very fortunate that the jury dealt with them as leniently as the verdict shows.

The contention that no concurrent negligence on the part of the defendant is shown is without merit. If the cars were running at the rate of speed testified to by plaintiff and the witness Gruenther, and they were traveling about 25 yards apart, as shown by the evidence, less than half a minute's time would elapse between the passing of

the first and the seventh car, and not more than three or four seconds between each car and the one following. The driver of each car as he approached could see the dangerous situation of plaintiff. None of them tried to lessen his danger, but all proceeded in the same manner and with the same unusual noises. This is not a case where several different cars were each running independently of the other and without any concert of action or agreement as to the manner of their running. It was one single procession, made up of the several cars as units of that procession. It was running as a procession by agreement, the speed of each car being regulated by the speed of the leader. If ever a case of concurrent negligence could be made out, it seems to us that it has been done here. The law in such a case is plain. As said by Judge Cooley in the third edition of his work on torts (1 Cooley, Torts (3d ed.) p. 247): "The weight of authority will, we think, support the more general proposition that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action." The rule announced by Judge Cooley is cited with approval in *Walton, Witten & Graham v. Miller,* 109 Va. 210. The same doctrine is also held in *Cleveland, C., C. & St. L. R. Co. v. Hilligoss,* 171 Ind. 417; *Cuddy v. Horn,* 46 Mich. 596; *Flaherty v. Minneapolis & St. L. R. Co.,* 39 Minn. 328, and *Corey v. Havener,* 182 Mass. 250. In the last case cited, two defendants, each mounted on a motor tricycle, with a gasoline engine making a loud noise, came up behind the plaintiff, who was driving slowly in a wagon, and passed him at a high rate of speed, one on each side, causing his horse to shy so that his wagon wheels struck another wagon, and plaintiff and his wagon were injured. He brought a separate action against each defendant and obtained a verdict against each: "Held, that, both of the defendants having been found to be wrongdoers, it made no difference that there was no concert between them, or that it was impossible to determine what portion of the injury was caused by each, that if each con-

tributed to the injury both were bound, and that whether each contributed was a question for the jury." In the opinion, on p. 252, the court say: "It makes no difference that the defendants were sued severally and not jointly. If two or more wrongdoers contribute to the injury, they may be sued either jointly or severally."

At the time of the trial the defendants severally moved the court to reserve "questions of law involved in this case for decision as affecting the judgment proper to be entered." The court did as requested, and answered the questions adversely to defendants. In this the court was fully sustained by the evidence and the law applicable thereto.

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

MARTIN LANGDON, APPELLANT, V. ELIZABETH WITHNELL ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,917.

Appeal: CONFLICTING EVIDENCE. The verdict of a jury, based upon evidence so conflicting that it would have sustained a verdict either way, will not, ordinarily, be disturbed on appeal.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

W. H. Herdman, Martin Langdon and *H. H. Bowes,* for appellant.

E. C. Hodder, contra.

FAWCETT, J.

Action in the district court for Douglas county, to recover attorney's fees. Verdict and judgment for defendants, and plaintiff appeals.

The first assignment of error is that the court erred in giving instruction No. 5. We deem it unnecessary to set

it out. We are unable to discover anything in it prejudicial to plaintiff. It is as favorable to him as his pleadings would warrant.

The second assignment is that the court erred in not instructing the jury on the question that under the evidence there might be a finding of an implied contract on the part of defendants to pay the reasonable value of plaintiff's services. Plaintiff's petition counts upon an express contract of employment, and the measure of his recovery, if it should be found that he was entitled to recover, was correctly explained to the jury by instruction No. 7.

Assignment No. 3 is that the court erred in the admission, over plaintiff's objection, of certain evidence. When the defendant Elizabeth Withnell was on the stand, counsel for plaintiff, on cross-examination, asked her: "Q. Did you ever ask any one what he (plaintiff) was doing in the case? A. Yes; I did. Q. And did you ever hear any of the heirs objecting to Mr. Langdon being in the case? A. No; I couldn't say that." She was then asked, on redirect examination: "Q. You say you heard how Judge Langdon came to be in the case: What did you hear?" (Objected to and objection overruled.) "A. Mr. Bellis told us that Judge Langdon had met him in the elevator and offered his services free on account of old friendship, old friends, that is what he said; said he wasn't going to charge a cent for his services." We cannot say that it was error to permit this explanation, on redirect examination, of the situation in which counsel for plaintiff had placed the witness in the closing questions of his cross-examination.

The remaining assignment is: "The judgment seems to be the result of passion and prejudice, and the judgment is contrary to the evidence." As to this assignment, the evidence is squarely conflicting, so much so as to make the question purely one for the jury. Plaintiff testified that he was employed by one Bellis, the husband of one of the defendants, to appear with their previously employed attorney, Mr. Knabe, for all of the defendants, and that his "recollection is" that as to some of the cases

the defendants Eliza and Elizabeth Withnell also told him they wanted him to appear. This testimony is flatly contradicted by Mr. Bellis and the two defendants named. Bellis, the only person with whom plaintiff is positive he talked about employment, testified that, as he (Bellis) was leaving the office of Mr. Knabe one morning, plaintiff accosted him and volunteered his services as counsel with Knabe, on the ground of personal friendship for the family, and stated that he would not charge "one cent" therefor; that he told plaintiff he would communicate his offer to Mr. Knabe; that after doing so he told plaintiff that Mr. Knabe had no objections to him, and also told him that he (Bellis) had no authority to employ any one, "that the heirs had made a contract with Mr. Knabe." All this is denied by plaintiff. In view of the large amount of work done and time spent by plaintiff in assisting Mr. Knabe in an effort to obtain for defendants the rights for which they were contending, and for which equity and good conscience would seem to call for some compensation, had the writer been the trier of fact, his finding would have been different from that returned by the jury; but that fact alone is not sufficient to warrant us in disturbing the verdict.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

HERMAN E. PANKONIN, APPELLANT, V. FRED H. GORDER ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,920.

1. **Landlord and Tenant**: CONTRACT: LEASE. The contract of sale and contract of lease, and the contract supplemental thereto, set out in the opinion, construed together as constituting the contract of sale and lease between the parties.

2. **Damages: LIQUIDATED DAMAGES: GOOD WILL.** The good will of an established business is a merchantable commodity, and where the same is expressly sold with the business to which it applies, and the measure of damages for a breach of the sale thereof is agreed upon and stipulated between the parties at the time, such agreement will be sustained by the courts unless it is made to appear that the amount so agreed upon is so excessive as to constitute a penalty, rather than compensation.

3. **Judgment: RES JUDICATA: OCCUPANCY OF PREMISES.** The decree of the district court, affirmed by this court in *Gorder & Son v. Pankonin*, 83 Neb. 204, examined, and *held res judicata* as to the question of the right of defendants to occupy the premises involved, for the period of time in controversy, on the same terms and conditions under which they entered into the possession of the same.

APPEAL from the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

D. O. Dwyer and *A. L. Tidd,* for appellant.

Rawls & Robertson and *Jesse L. Root, contra.*

FAWCETT, J.

Plaintiff instituted this action in the district court for Cass county, to recover rent for certain premises in the village of Louisville, in that county. The jury returned a verdict in favor of defendants, upon which judgment was entered, and plaintiff appeals. The issues joined by the pleadings and necessary to be considered will sufficiently appear in the discussion of the case.

In February, 1901, plaintiff was a dealer in implements and harness in the village of Louisville. On the 13th of that month he entered into a contract to sell to defendants, or to the firm of Fred Gorder & Son, of which firm the defendants are surviving partners, his stock of goods, with certain exceptions which need not be noted, and in and by the same instrument contracted to rent the buildings, and all warerooms in which the business had theretofore been conducted, to the defendants for a term of one year, with the privilege of five years or more, at a monthly rental of $22, and contracted "to stay out and

not engage in the implement or harness business in Louisville, Neb., so long as the first party (the defendants) rents said building at above rent." Two days later, on February 15, the parties executed a formal lease for a term of five years, from February 20, 1901, with an option to defendants to have a renewal of the lease at the expiration of that term for a period of one year or more, up to five years. In these contracts a reservation was made by plaintiff of office room in one of the buildings. On September 12, 1902, the parties entered into another agreement, which purported to be additional and supplemental to the agreement of February 15, 1901. This supplemental agreement recited that it was made in consideration of the settlement of certain differences which had arisen between the parties, on account of a breach by plaintiff of the conditions of the lease entered into on February 15. It stipulated that, in addition to the covenants in the former contract contained, plaintiff was to have the use of one-half of the building on lot 294, and an increase of the monthly rental to $23.50 a month. The lease executed February 15 recited: "Also in consideration of the covenants and agreements hereinafter specified to be done and performed by second party, first party agrees to, and hereby does, sell and assign to second party his good will in the business of general harness store and implement store, excepting that of pumps and windmills, which he is now carrying on in said buildings, located on said property; and agrees not to engage in the same business in the village of Louisville, during the continuance of this lease. In consideration of the leasing of said premises from said first party, and of the agreement on the part of the first party to remain out of the general harness and implement business in the village of Louisville as above specified during the term of this lease, second party hereby agrees with the first party to pay said first party the sum of twenty-two ($22) dollars per month, payable monthly in advance. It is further stipulated and agreed between the parties that in case first party, at any time during the period of this lease, carries on or engages in the general harness and

implement business such as he is selling to second party, that second party is to have the use of said buildings from such time until the expiration of this lease free of charge without the payment of any rent. It is further mutually understood and agreed between the parties hereto that, at the expiration of the term of this lease, second party has the option of leasing said buildings for a period of one year or more up to five years for the same consideration, and upon the same terms and conditions as are in this lease named." In the agreement of September 12, 1902, in which the rental is increased to $23.50 a month, plaintiff again agreed in express terms that he would not engage in the general harness and implement business, such as he had sold to defendants, in the village of Louisville, either on his own account or in partnership with any other person either directly or indirectly, and that, in case he did so engage in that business, defendants were to have the use of the buildings from such time until the expiration of the lease free of charge, without payment of rent, "and that such rental value is hereby fixed and agreed between the parties hereto as liquidated damages which said second party will sustain by reason of any breach of said contract and lease by the said first party. The intention of the first party being as it was in said former agreement and lease, to sell and assign to second party his good will in the business of general harness store and implement store, which he sold to second party."

It will be seen from an examination of these three instruments that they should be taken and construed together as constituting a contract of sale and leasing by plaintiff of his business and buildings to the defendants. In due time, prior to the expiration of the five-year period, defendants notified plaintiff of their election to continue for another five years and requested the execution of a new lease. This plaintiff refused; whereupon defendants brought suit in the district court for Cass county, for specific performance of their contract, in which suit the three contracts of sale and leasing above referred to were set out. In that suit the plaintiffs (defendants here) also

prayed for an injunction restraining the defendant there (plaintiff here) from again engaging in the business, the good will of which he had sold, during the five years' extension which plaintiff in that suit claimed they were entitled to. Upon a hearing the district court entered a decree in which it found generally in favor of the plaintiffs, except in so far as plaintiffs prayed for an injunction enjoining defendant from engaging or continuing in the business which he had sold. As to that the court found: "That plaintiffs have an adequate remedy at law for liquidated damages provided for in the contract of lease involved herein." The court further found that the plaintiffs were entitled to a decree of specific performance "of the option given to plaintiffs in said former lease and contract for five years from February 20, A. D. 1906 (the expiration of said former contracts and lease), upon the same terms and conditions, and for said terms and conditions reference is hereby made to said former contracts and leases, which are also set forth in plaintiffs' petition," and adjudged and decreed that the defendant execute to plaintiffs a lease of the premises "upon the same terms and conditions as set forth in the contracts and leases under which plaintiffs held the premises for the five years terminating in 1906, and that, in default thereof, this decree stand in lieu thereof, and for the several provisions reference is hereby made to the above findings and said original contracts and leases as set forth in plaintiffs' petition, and said lease shall be for the term commencing February 20, A. D. 1906, and terminating February 20, A. D. 1911, except in said lease there shall be no provision for an option to extend said lease for any further period after February 20, A. D. 1911."

It will be seen from this decree that the district court treated the contract of February 13, the lease executed February 15, and the supplemental agreement of September 12, as constituting the contract under which defendants were occupying the premises, and decreed to defendants the right to continue such occupancy for a further period of five years. From that decree the defendant

(plaintiff here) appealed to this court. On a hearing of that appeal the decree of the district court was affirmed. *Gorder & Son v. Pankonin,* 83 Neb. 204. The five years' extension covered by that decree are the five years for which plaintiff is seeking to recover rent in this action.

It appears, therefore, that the question of the right of defendants to occupy the premises for that period of time for a rental of $23.50 a month provided plaintiff did not reengage in the business which he had sold to them, or without rent in case he violated his agreement and did reengage in such business, is *res judicata.* That plaintiff did, on or about February 20, 1906, the date of the expiration of the first five-year period, engage in this business, contrary to the terms of his contract, and that he continued so to do during the whole period of time for which he now seeks to recover rent, is undisputed, and that he should now be held liable for the liquidated damages for such breach which had been agreed upon between the parties should not now be questioned. It was one of the conditions upon which defendants purchased his business. It constituted a part of the consideration which defendants paid for the business and use of the premises. Defendants paid plaintiff $4,200 for his business, consisting of his stock and good will, on the conditions named in the contract, as above set out. The good will of an established business, for which a party was paying such a sum of money, was unquestionably of great value. The parties themselves fixed the value of a loss of the good will so sold at $23.50 a month during all of the time defendants continued to occupy the property after they had been deprived of such good will. It was not a forfeiture, and the authorities cited upon that point do not apply. It was a sale of a merchantable commodity—good will—for a definite period of time, at a fixed value per month. It was in every respect fair and should be enforced by the courts.

This so completely disposes of the merits of the controversy that nothing more really need be said. We will, however, refer to the objections to the refusal of the court to give two instructions requested by plaintiff, viz., in-

structions 2 and 3. Instruction No. 2 was to all intents and purposes a direction for the jury to return a verdict for the plaintiff. It was properly refused. By instruction No. 3 the court was asked to tell the jury that the provision for "forfeiture and liquidated damages in the leases dated February 13, 1901, February 15, 1901, and September 12, 1902," were limited to the period from February 20, 1901, to February 20, 1906, and did not run with the renewal. This instruction was properly refused. It did run with the renewal and had been so adjudicated in *Gorder & Son v. Pankonin, supra.* Exhibit J was properly admitted. It was not an offer of compromise. It was an offer to purchase from defendants, for $100, their right to the use of the premises for the unexpired term of their lease as fixed by the decree in *Gorder & Son v. Pankonin, supra.*

Plaintiff had a fair trial, the verdict is amply sustained by the evidence, and we find no error in the rulings of the trial court.

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. JAMES C. MCNERNEY, APPELLANT, V. ALVIN H. ARMSTRONG ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,864.

1. **Municipal Corporations:** AREAS IN SIDEWALKS: DISCRETION OF COUNCIL. Under the statutes governing cities of the first class having more than 40,000 and less than 100,000 inhabitants, the matter of allowing and regulating entrances to basements through sidewalks is within the reasonable discretion of the mayor and council.

2. ———: ORDINANCE: CONSTRUCTION: AREAS IN SIDEWALKS. The sections of the sidewalk ordinance of the city of Lincoln quoted in the opinion cannot be construed to prohibit all openings in the sidewalk for stairways, and basement ways, in view of the statute

requiring the mayor and council to regulate such openings, and the practical construction of those provisions for many years.

3. ———: AREAS IN SIDEWALKS: DISCRETION. Under the circumstances in this case, indicated in the opinion, permitting the construction and use of the stairway in question was not an abuse of discretion.

4. ———: ———: ———. Although such stairway somewhat restricts the free and unembarrassed use of the sidewalk for pedestrians, such use may be justified on the ground that the general interest is served by making available valuable property, increasing business facilities, and encouraging improvement.

5. ———: ———: AUTHORIZATION BY RESOLUTION. Such permission may be given informally by resolution and without a formal ordinance.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

James C. McNerney, for appellant.

Fred C. Foster, D. H. McClenahan, F. M. Hall and *Meier & Meier, contra.*

SEDGWICK, J.

In August, 1910, the First National Bank of Lincoln asked the mayor and city council for "a permit for the erection of the new First National Bank building, to be located at the southeast corner of Tenth and O streets, Lincoln, Nebraska." It was stated in the application that "the drawings call for an areaway, same being forty-five feet long by five feet wide in the clear. This areaway would be located twenty-five feet from alley line on the Tenth street side of the building." The permit was granted as requested and the building was erected. It was understood that this areaway was for the purpose of constructing a stairway to the basement of the building. Afterwards the relator began this action in the district court for Lancaster county against these defendants, who are the mayor and council of the city of Lincoln, to compel them to cause the "open areaway in the public sidewalk in Tenth street, adjacent to the west line of lot 12, in block

55 of the original plat of the city of Lincoln, to be closed, the iron fence and the concrete footing upon which the same stands on the public sidewalk inclosing the side and end of said open areaway to be removed, and each and every part of the public sidewalk space adjoining the said west line of aforesaid lot 12 to be made safe and unobstructed for public travel thereon." The district court found the issues in favor of the respondents and dismissed the proceedings. The relator has appealed.

Section 4475, Rev. St. 1913, provides: "The mayor and council shall have supervision and control of all public ways and public grounds within the city, and shall require the same to be kept open, in repair and free from nuisances."

Section 4418 gives the city authorities power "to remove all obstructions from the sidewalk, curbstones, gutters and cross-walks at the expense of the owners or occupants of the grounds fronting thereon, or at the expense of the person placing the same there; and to regulate the buildings of bulkheads, cellars and basement-ways, stairways, railways, windows and doorways, awnings, hitching posts and rails, lamp posts, awning posts, and all other structures upon or over adjoining excavations through or under the sidewalks of the city."

The sidewalk ordinance of the city of Lincoln provides:

"Section 1. Hereafter there shall be reserved on each side of every street in the city of Lincoln, for sidewalks and for the cultivation of trees and grass, a space equal to one-fourth of the street from abutting lot lines: Provided, that on streets in paving districts, said space shall extend from the lot line to the curb line.

"Section 2. All sidewalks * * * in front and alongside of any building in any part of the city where areaways or cellars are in use under any sidewalk, and also in front of any lot used for any business purpose shall extend from the line of the abutting lot to the curb line.

"Section 3. Sidewalks on business streets or portions thereof shall be constructed so as to incline upwards from the outer edge of the sidewalk toward the building or

boundary of the lot at the rate of not less than one inch nor more than one and one-fourth inches in three feet; the outer edge of said walk to rest on the top of the curb; and no part of said walk shall be taken for private use by lowering or cutting down the same next to the building; and said walk shall be built up to the building on a uniform grade."

"Section 7. No person shall be allowed to keep or use for vaults, areas, or other purposes, the space beneath the sidewalk included within the sidewalk lines of any street in this city, unless a permit therefor shall have been obtained from the city council; such permits, heretofore granted or hereafter to be granted, shall continue, or to be issued, only upon condition that the party receiving the same shall, as a consideration for such use and such privilege granted, build, maintain, and keep in repair a sidewalk over such space intended to be used for vaults, areas, or other purposes, and pay all damages that may be sustained by any person by reason of said sidewalk being in a defective or dangerous condition."

"Section 9. Areas about windows opening through the sidewalk immediately adjacent to the buildings to admit light and air to a basement, shall be protected and covered by strong iron grating, the bars of which shall not be more than one inch apart, and so constructed that the same may be walked upon with safety, and of sufficient strength to hold any weight that would come upon the walk at this point. In order to prevent accidents, all hatchways, coal holes, or openings of any sort through sidewalks shall be provided with strong iron or iron and glass coverings, with rough surface, and the entire construction of said areas, hatchways, entrances and opening shall be subject to the direction and supervision of the city engineer."

"Section 11. It shall be unlawful for any person, firm or corporation to leave open any opening in any sidewalk, or suffer the same to be left or kept open, or suffer any sidewalk in front of his or its premises to become or continue so broken or otherwise defective as to endanger life or limb."

The relator contends that these statutes and these ordinances require that there shall be no openings in the sidewalk, and that the city council has no power to allow such openings for stairways to the basements of buildings under any circumstances. The statute evidently leaves the matter with the city council. They are given express power to "remove all obstructions from the sidewalk, * * * and to regulate the building of bulkheads, cellars and basement-ways, stairways, * * * and all other structures upon or over adjoining excavations through or under" sidewalks. The power to "regulate" basement-ways, and stairways and excavations through sidewalks, of course, does not imply that such things are forbidden by statute; conferring such powers rather implies that, under some circumstances, such basement-ways, stairways, and cellars and excavations through sidewalks will be appropriate and necessary and ought to be regulated by ordinance.

In *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, it was contended that a city or incorporated town had no power to grant a telephone company the use of its streets, alleys and public grounds, but the court held that such power existed, and in the opinion it was said: "That the city may order the removal of poles which endanger the citizens because of a rotten condition, and protect its inhabitants against any conduct of the business which endangers the public health or safety, is not a question open to dispute; but nothing of the kind appears in the record before us. As before stated, Main street is 100 feet in width. There is no evidence of a congested condition of the street or of any necessity from other causes for removing the defendant's poles."

The statute of Iowa requires the city authorities to keep the streets open and free from nuisances, and does not expressly authorize areaways and stairways through sidewalks, but the supreme court of that state decided: "Areas for light, and basement windows, and descents are necessary, in order to carry on business in a city, and, if such excavations are properly guarded, * * * they do not, in themselves, constitute a nuisance." *Keyes v. City of Cedar*

Falls, 107 Ia. 509. In a later case that court has quoted with approval from the case last cited, and said: "In view of these expressions, the interpretation put on the statute for many years, and the universal use of the streets close to buildings for areas and cellar stairways, we are not ready to say that the power to permit them is not included in the sections of the code quoted." *Perry v. Castner,* 124 Ia. 386. These cases have been frequently cited with approval by decisions of that court. In *Jorgensen v. Squires,* 39 N. E. 373 (144 N. Y. 280) the court of appeals of New York decided: "A city authorized 'to regulate the use of sidewalks' (Consolidation Act 1882, sec. 86) may authorize the building by property owners of openings for cellarways in the sidewalk." In *Wendt v. Incorporated Town of Akron,* 142 N. W. (Ia.) 1024, it was decided: "Despite code, sec. 5078, declaring the obstructions to public streets to be nuisances, a municipal corporation may, under section 753, giving such corporations the care, supervision, and control of all public highways in the city, authorize an abutting owner to use the street for areaways and cellar stairways when it does not cause injury to others."

The relator relies upon *Chapman v. City of Lincoln,* 84 Neb. 534, in which it was held: "Whatever space in a public street of a city is set apart for the use of the public as a sidewalk, the public have a right to use in its entirety, free from any and all unauthorized obstructions, and it is the duty of the mayor and city council to see that it is kept in that condition." That was a correct statement of the law as applied to the facts in that case. An ordinance was enacted making it "unlawful for any person, persons or corporation to erect or maintain any booth, shed, stand or other obstruction upon the streets, sidewalks or sidewalk space of the city of Lincoln for the sale of fruit, books or other merchandise, or any article or thing of value, or to erect or maintain any shed or booth or stand thereon to be used for shining boots and shoes." Chapman sought to enjoin the enforcement of this ordinance, and this court affirmed the judgment of the district

court holding that it was within the discretion of the city authorities to prohibit such use of the sidewalks. The fact that the location involved was "on the opposite side of the same street and less than 100 feet" from the stairway in question here does not make that a case "similar in many respects to the case at bar." The plaintiff's tenants erected an "inclosed shed or booth" on the sidewalk in which they were "handling fruits, cigars, tobacco, and like subjects," and there was no doubt of the jurisdiction of the city authorities to enact and enforce an ordinance preventing such use of the sidewalk.

The question, then, is upon the construction of this sidewalk ordinance. As applied to the question before us, it must be conceded that the ordinance is not as clear and definite as might be desired. The evidence shows a practical construction of the ordinance by the city. It appears that there are many basements in the business part of the city with entrances by basement-ways through the sidewalk, and that for 40 years this bank has maintained a bank building, with basement and a basement-way through the sidewalk at this place which required a superficial opening in the sidewalk much larger than the one now in question. The word "area" has a somewhat elastic meaning. We find from Webster's New International Dictionary that it originally meant "a broad piece of level ground." In modern use it may mean: "(1) Any plane surface. * * * (2) The inclosed space on which a building stands. (3) The sunken space or court giving ingress and affording light to the basement of a building. (4) A particular extent of surface."

The word "areaways" in section 2 of the ordinance is plainly the equivalent of cellar or room under the sidewalk; such rooms must not interfere with the public use of the sidewalk. Section 7 requires that a permit shall be obtained before the space beneath the sidewalk shall be used for private purposes. The covering which constitutes the sidewalk over such rooms must be built and kept in repair by the owners of the rooms so used. By section 9 openings may be left around a window in a basement to

"admit light and air," and in such case such openings must be covered with an "iron grating," which will form a part of the sidewalk. The same section requires that "hatchways" and openings through the sidewalk "shall be provided with strong iron or iron and glass coverings." The relator construes this literally, and concludes that it prohibits "basement-ways and stairways" for entrances to basements. A hatchway is not a stairway or basement-way; hatch is a nautical term and generally signifies an opening in the deck of a ship. Webster. In view of the fact that basement-ways through the sidewalks have been in use in connection with at least 100 buildings in the business part of the city, and particularly at the place in question for more than 40 years, we cannot presume that it was intended by these various regulations, the purpose of which is plain, to change this policy and forbid all basement-ways through sidewalks, without specifically mentioning them. No section of this ordinance, as disclosed in this record, applies specifically to basement-ways or stairways. The rental value of this basement is $1,000 a year. The sidewalk at this place is 25 feet wide. O street is the principal business street of the city. The entrance to this stairway begins about 70 feet south from O street, and extends about 45 feet south. It is about 5 feet wide, and is surrounded on the west and south by an iron railing of "3-inch pipe," one top rail about 3 feet high, and another "between that and the ground about equal distance." The entrance is guarded by a similar railing on the north "out four or five or six feet from the entrance," so that one must enter from the west and then turn to the south to go down the stairway.

The matter of allowing and regulating entrances to basements through sidewalks is within the reasonable discretion of the city authorities. The evidence in this case does not show an abuse of discretion on the part of the mayor and council.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., took no part.

LETTON, J., concurring in conclusion only.

It is elementary that an ordinance of a permanent character cannot be amended by a mere resolution of a temporary nature. It seems clear to me, therefore, that the permit granted by the council attempted to allow a violation of the ordinance of June 10, 1910. While there are many open areaways in the city, there is no proof that any have been constructed since the ordinance went into effect. The ordinance changed the policy of the city and showed the intention of its authorities that no uncovered openings should be thereafter allowed in sidewalks within prescribed limits. The evidence shows that a number of like applications have been denied since it went into effect, and that the permit to the First National Bank is the only one that has been issued.

An areaway is not usually considered a nuisance *per se*. It is permitted by the statute. In the absence of this ordinance, the city authorities would have power to permit it by resolution. The fact that a much longer areaway had been used in connection with the old bank building on the lot for many years, no doubt, had much weight with the city council in passing the resolution; but in my judgment the council should have amended the ordinance if it desired to grant the permit.

The relator shows no special injury peculiar to himself independent of and different from that, if any, suffered by the public at large. No property right of his is affected, and there is ample space on the sidewalk at this point for public travel. The rule applies that one seeking a writ of mandamus to compel action by a public officer must show a special interest in the relief sought and a clear right to the writ, or it will not be granted.

I therefore concur in the conclusion.

LUCY E. WILLIAMS, APPELLEE, V. WESTERN TRAVELERS ACCIDENT ASSOCIATION, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,865.

1. **Insurance:** ACTION: LIMITATIONS: QUESTION FOR JURY. A mutual accident association could limit the time within which suit might be brought against it "on any claim based upon its policies or certificates of membership * * * to a period of (not) less than one year from the time such right of action accrues," under section 17, ch. 53, laws 1903. The defendant's by-laws provided that no right of action should accrue "within ninety days after the receipt of proof of loss at the office of the association." Under the circumstances in this case, stated in the opinion, it became a question of fact for the jury to determine as to when the proofs of loss were received by the company.

2. ———: ———: ———: REVIEW. In such case, when no special instruction or finding is requested as to when proof of loss should be considered as received by the association, and the evidence is substantially conflicting as to the receipt of such proofs at a time within one year before the commencement of the action, a general verdict for the plaintiff will not be set aside on the ground that the cause of action accrued more than one year before the commencement of the action.

3. **Compromise and Settlement:** CONCLUSIVENESS. Ordinarily one who receives and signs a written instrument is presumed to know and agree to its contents, and mere negligence or carelessness on his part will not relieve him of this responsibility. But one who knows that the party with whom he is dealing will probably be careless in examining papers presented for signature, and purposely attempts to induce such carelessness, and so obtains the signing of the papers, which would not be signed if fully understood, will not be allowed to urge the carelessness of such party who signs the papers without knowing the contents thereof.

4. **Insurance:** ACTION: CAUSE OF DEATH: VERDICT. The defendant's by-law provided that, for "death resulting from cerebral hemorrhage * * * or heart failure caused by accidental injuries," the amount payable shall be limited to $500. *Held*, That the evidence, indicated in the opinion, is sufficient to support a general verdict, which includes the finding that death was not the result of either of those causes.

5. ———: ———: RETURN OF MONEY PAID. It is also considered that, under the circumstances in this case, the plaintiff could maintain

this action without returning the amount advanced by defendant before suit was brought.

6. **Appeal:** CONFLICTING EVIDENCE. This case requires the application of the rule, so often announced, that the verdict of a jury upon substantially conflicting evidence will not be reversed as unsupported, unless, upon the whole record, it appears to be clearly wrong.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Brome & Brome, for appellant.

Stewart, Williams & Brown, V. A. Crum and *L. R. Slonecker, contra.*

SEDGWICK, J.

The defendant is a mutual accident insurance company, organized under the laws of this state. It issued its policy of insurance upon the life of one Dan N. Williams. Afterwards, in January, 1910, Williams died in the city of Portland, Oregon. This action was brought by his widow, Lucy E. Williams, in the district court for Douglas county, upon the certificate of membership. The plaintiff recovered a verdict and judgment in the sum of $5,462.10. The defendant has appealed.

The defendant contends that the evidence is not sufficient to support the verdict; that the action was barred by the contract of limitation, not having been begun within one year from the time of making of proof of death; that the claim was settled and adjusted by the defendant before the commencement of the action; that the trial court erred in giving certain instructions to the jury, and also erred in refusing to give an instruction requested by the defendant.

1. The certificate of membership was issued in July, 1902. At that time agreements in contracts as to the time in which actions might be brought were contrary to public policy and void. This had been declared in several decisions of this court. *Miller v. State Ins. Co.,* 54 Neb. 121.

In the following year the legislature enacted a statute regulating such companies, which provided: "Any corporation, association or society organized or operating under this act may limit the time within which suit may be brought against it on any claim based upon its policies or certificates of membership, and after the expiration of the time thus limited shall not be liable thereon; provided such limitation shall be incorporated in, and form a part of the contract between the company, association or society and the assured or its members; and provided further that such limitation shall not be limited to a period of less than one year from the time such right of action accrues." Laws 1903, ch. 53, sec. 17. The act also provided that corporations, associations or societies before that time incorporated and doing business in the state might avail themselves of the provisions of the act by filing a certificate with the auditor of state, with the following proviso: "Provided this act shall not relieve any corporation, association or society now doing business in this state from the fulfilment of any contract heretofore entered into with its members under its policies or certificates of membership, nor shall any member be relieved thereby from his or her part of the contract." Laws 1903, ch. 53, sec. 3. The defendant company availed itself of these provisions and afterwards, in 1907, amended its by-laws by adding the following provision: "And no legal proceedings for recovery under any certificate of membership shall be brought within ninety days after the receipt of proof of loss at the office of the association, nor at all, unless begun within one year from the time that right of action accrues, as above stated." It is contended that this amendment of the by-laws was unreasonable as to the insured and not binding upon his beneficiary, but, without deciding this question, we prefer to place our decision upon the construction of the by-law, as amended, and its application in this case.

This action was begun in July, 1911, about 18 months after the death of the insured. The by-law, as amended, provides that no action could be begun more than a year after the cause of action accrued. It also provides that

no action shall be begun "within ninety days after the receipt of proof of loss at the office of the association." The controversy upon this point is as to the time when the proof of loss was received at the office of the association, within the meaning of this contract.

The defendant's by-laws provide that it shall be the duty of the executive board to "decide on all proofs of accident and of death by accident." It seems that the secretary was not empowered to decide those matters. The plaintiff claimed that the death of the insured was caused by an accidental fall while alighting from a street car, on the 25th day of December, 1909, and that he died on the 3d day of January, 1910. The company's by-laws required that written notice of the accident must be received at the office within 15 days from the date of the accident, and that proof of death should be filed in that office within 30 days from the date of death. On the 18th of January, 1910, the plaintiff sent the defendant a formal statement showing the death of the insured. This statement was upon a blank furnished by the company, and was entitled "Claimant's preliminary statement," and stated that it was "made for the purpose of giving information to the said association to obtain benefits therefrom under final proofs to be hereafter furnished by me." Several affidavits were also submitted with the statement with a letter referring to the papers as "Claimant's preliminary statement," and requesting the defendant to correspond concerning the matter with Lee Meyers, of Portland, Oregon, who was plaintiff's nephew. Upon receipt of this letter Mr. Butts, the defendant's secretary, wrote to Mr. Meyers, stating that he had received a letter requesting the company to address Mr. Meyers. In this letter the secretary made no reference to the papers which he had received, and made no objection to the delay in furnishing what was to be considered as final proof, but said: "In connection with this matter will say that the evidence at hand indicates that Mr. Williams' death was due to natural causes."

About a month later the plaintiff wrote Mr. Butts a letter in which she said: "I received through Mr. L. H.

Meyers your statement saying you found that my husband Dan N. Williams died from natural causes. I just want to tell you that I would like to have you try the fall he had and see how many could live he fell on the back of his head hard enough to be heard on the other side of the street was picked up and brought to the house by one delivery man Mr. Gehr and his son both saw him fall. He was hurt so badly he could not see to read the next day and complained constantly of his head. He never laid down fifteen minutes after he got here until after he died. The poor man would look at me and say I tell you Mamma that did hurt my head then he would jump up and pull his clothes off and fight us but did not have any fever any time during the nine days he lived. He had come here to rest and spend the holidays. * * * How many times I wanted him to drop it he would always tell me it might do us some good some time perhaps it has. * * * When we get to be as old as I am 53 years it is quite hard to start out to earn a living. Please don't think silly for I am so full of trouble I don't know what to do sometimes, but I have always put my trust in Him who knows all things and cares for the widows and orphans."

Mr. Butts answered this letter as follows: "This will acknowledge receipt of your letter of the 18th inst. It is with deep regret that we learn of your unfortunate circumstances as the result of the death of your husband, Mr. Dan N. Williams, whom we have always highly esteemed as a prominent member of this association. As an expression of our kind feeling on account of the circumstances so plainly stated in your letter, we are inclosing you herewith our check for $100, which will more than reimburse you for the amount paid into the association by Mr. Williams. This is not the practice of our association, but we feel that this amount will be acceptable and appreciated. It is customary where a membership is terminated to surrender the certificate, and if certificate No. 9823 is in your possession, please return to us by early mail when you acknowledge receipt of this letter. By this letter we waive none of our rights in the premises."

The plaintiff cashed this check. The consequences of her so doing will be considered in another connection.

Afterwards the plaintiff employed Mr. Crum, an attorney, who wrote to the defendant April 26, 1910, stating that he had the policy in question, and that "Mr. Williams accidentally fell on the 25th day of December, 1909, striking his head on the pavement. He died on or about the 3d day of January, 1910, as a result of his injury. On being notified of the accident you forwarded Mrs. Williams a check for $100, which leaves a balance due her of $4,900. Kindly let me hear from you." He received no answer, and afterwards wrote another letter, and still received no answer. He again wrote on the 15th of July, 1910, inclosing formal proof of the death of Mr. Williams as a result of the accident. August 9, 1910, Mr. Butts wrote a letter to Mr. Crum, in which he acknowledged the receipt of "various letters," and stated: "We made no response to these letters as final settlement had been made with Mrs. Williams direct, and her receipt dated February 23, 1910, is as follows:" He then set out a copy of the proviso which he had written in the check which he sent to Mrs. Williams, and said: "We therefore consider the matter closed."

Bearing in mind that the plaintiff under the defendant's by-laws could not maintain an action until 90 days after final proof had been received by the company, and that the company by furnishing her with formal blanks had induced her to suppose that her first proofs which she sent were preliminary only, and that the company had not up to this time acknowledged the receipt of the proofs contemplated in the contract, and that the proofs already submitted had not been considered by the executive committee, which alone was qualified to pass upon them, it must be conceded that the defendant's conduct would naturally, if not so intended, mislead the plaintiff in regard to the completeness of the proof. The company received and retained the formal proofs sent them July 15, 1910. No objection was made to the delay as a ground for contesting the claim. Indeed the delay may well have been caused

by the evasive and noncommittal attitude of the secretary. If the proofs of death were completed and received by the company as such after the 15th of July, 1910, the time limited by the by-laws had not expired when this action was begun. The question as to when the complete proof was received by the company, under the circumstances, was a question of fact for the jury, and it cannot be said that the finding in that regard was wholly unsupported by the evidence. No special instruction upon this point was given, but, as none was requested, the defendant cannot now complain on that ground.

2. The defendant strongly argues that the receipt of the check above recited, and receiving and keeping the money thereon, operates as a compromise and full settlement of the plaintiff's claim against the defendant. It is true that the language contained in the check, if agreed to by the parties, would amount to a compromise and settlement, as contended. The plaintiff testifies that, on account of the condition in which she was left by the death of her husband, she did not give such attention to the transaction as she would ordinarily have given to transactions of this nature; that she did not read the check, had never before received but one check in her life, and that she understood that the purpose of the check was solely to enable her to get the money from the bank, and not for the purpose of expressing the condition upon which the check was given. It is urged that the plaintiff was careless in not examining the check and not knowing its contents. Ordinarily such a suggestion would have great force. The letter which she wrote to the company, however, would indicate that she might not be as careful in examining financial transactions as business men are generally supposed to be, and the letter of the secretary in which he inclosed the check indicates that he realized that fact and supposed that she might not comprehend the force of the words which he had put in the check, and also indicates that he expected that she would not agree to such a compromise if fully understood by her, and designed to take advantage of that fact. He says that the check is sent her "as an expression

of our kind feeling on account of the circumstances so plainly stated in your letter. * * * This is not the practice of our association, but we feel that this amount will be acceptable and appreciated." We think that the company ought not now to accuse this plaintiff of negligence in not more carefully examining the check. It is urged that the request in this letter that the certificate of membership be returned to the company was an indication in the letter itself that the check was sent as a complete settlement, but the secretary upon the witness-stand testified that it was customary to demand a return of the certificate upon the death of a member, without regard to whether the claim was acknowledged or contested by the company. The court instructed the jury that, if she did not know that there were words in the check reciting that it was in full settlement of her claim, she was not bound by it, and, under the circumstances in this case, we think that the instruction was correct.

3. The by-laws of the company contained the provision that, for "death resulting from cerebral hemorrhage, cerebral paralysis, apoplexy or heart failure caused by accidental injuries," the amount payable shall be limited to $500. The defendant contends that the death of the insured was caused by cerebral hemorrhage, and therefore the court should have instructed the jury that in any case they could not find a verdict for more than $500. The evidence was that the deceased fell heavily, striking the back of his head on the frozen ground. Some of the witnesses testified that the covering of the brain was discolored; and it would appear from the evidence that the blood vessels were bruised and partly broken in the covering of the brain, and perhaps in some parts of the brain itself, so that some blood escaped among the tissues. The expert witnesses described it as ecchymosis, caused by the blow. Ecchymosis, according to Webster's New International dictionary, is: "A livid or black-and-blue spot, produced by the extravasation or effusion of blood into the areolar tissue. It is caused by a contusion and generally attended by swelling." So far as the evidence in the record shows, a

severe blow of this kind on the back of the head must have produced this condition in the immediate vicinity of the blow. It is an entirely different thing from a cerebral hemorrhage, which suffuses the brain and causes death. Of course, in one sense this accident caused heart failure. Death, no matter what the cause, is always accompanied by the failure of the heart, but it is not conclusively shown by this evidence that death was caused either by heart failure or the escape of blood into the brain.

The contention that the $100 received by the plaintiff should have been returned before the commencement of this action is without merit, under the circumstances in this case. It is not necessary that the evidence should be so conclusive upon the various questions of fact presented that the court must have found the issues as the jury did. When the evidence is substantially conflicting, such questions are for the jury, and their verdict will not be disturbed, unless, upon the whole record, it appears that it is clearly wrong.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CHARLOTTE H. RICHELIEU, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. NO. 17,660.

1. **Master and Servant:** DEATH OF SERVANT: EMPLOYERS' LIABILITY ACT: "DEPENDENT." Under section 1, ch. 149, pt. 1, 35 U. S. St. at Large, a sister of the decedent, who sues as administratrix of the estate, and upon the trial establishes that the decedent contributed to her support by the gift of money, by the payment of her board, and otherwise, will be considered a dependent, and entitled to recover damages because of the injury suffered, even though possessed of property and having a clerical position which in part supports her.

2. New Trial: CONTINUANCE: ABUSE OF DISCRETION. Where the district court refused to allow the defendant a continuance, and the defendant was thereby prevented from presenting its theory of its defense to the court and jury, and was denied a fair trial, the action of the court will be deemed to be an abuse of discretion, for which a new trial will be granted. Laws 1911, ch. 39, sec. 1.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Edson Rich and *John A. Sheean,* for appellant.

Nelson C. Pratt, contra.

HAMER, J.

Under the federal employers' liability act (35 U. S. St. at Large, pt. 1, ch. 149, sec. 1), the plaintiff, as administratrix of the estate of Harry E. Richelieu, deceased, sued the defendant, the Union Pacific Railroad Company, in the district court for Douglas county to recover damages for the death of her brother, alleged to have been caused by the negligence of the company. There was a verdict in her favor of $12,000, and, on an order of the court in overruling the motion for a new trial, the plaintiff remitted from $12,000 down to $8,000, and a judgment was rendered for the latter sum against the defendant, and the defendant appeals.

The deceased was one of a crew of six men operating local freight train No. 57, west-bound between Council Bluffs, Iowa, and Columbus, Nebraska. On this run it was customary for the members of the crew, while at Waterloo, to consider what work was to be done at Valley, and it was the intention of the crew, while on this particular run, to transfer a certain flat car occupying a position next to the engine to the rear end of the train, immediately in front of the caboose, and to place a private car, standing at the depot east of Valley, onto the extreme end of the train. As the train passed the depot at Valley on the west-bound main line and entered the station from the east, Justison, the rear brakeman, got out on the platform of the caboose or way car, and uncoupled it from the train,

and brought it to a stop about opposite the depot. The main train continued west past the cut-off switch leading to the passing track on the north. Boynton, who had been on the engine since leaving Waterloo, dropped off on the ground, alighting opposite the station, for the purpose of securing from the agent there the switching list. Richelieu got off at a point further west to let the train in on the north passing track. The cut-off switch was thrown by Richelieu, and he then walked down to the next switch further east, which connected up with the passing track proper, and threw that switch also. Boynton passed back of the train, and while with Richelieu directed him to throw the switch on the passing track. The train was then shoved in on the passing track, and while it was backing up Boynton told Richelieu what the conductor had said was to be done. While the train was moving slowly eastward, Richelieu stepped between the first and second cars from the engine and turned an angle cock off on the train with his right hand, and then turned it off on the left on the flat car with the same hand, and at the same time he reached for the pin-lifter, and after taking a few steps, perhaps not more than six feet, he stepped from between the cars and stepped down into the frog with his left foot, and the wheel had his foot almost instantly. The train appears to have been moving about two miles an hour, and it went about twelve feet after the engineer commenced to apply the emergency brake. The wheels of the car ran over Richelieu's left leg and arm.

It is contended that the frog over which Richelieu was compelled to go to perform the duties of uncoupling the cars was not properly blocked, and that the defendant would have been free from harm but for the defective condition of the frog. There is some evidence tending to show that the frog had previously been blocked, but that it had worn out. We are confronted with the question as to whether the defendant was permitted to submit to the jury its theory of the case. Unless the frog was in such condition when the deceased stepped out from between

the cars that it caught his foot and held him, there is no liability.

The bill of exceptions shows that, to permit argument of counsel, the jury were excused until 9:30 A. M. Monday, May 29, 1911, at which time the following proceedings were had: "The court: The motion to direct a verdict is overruled. To which ruling the defendant excepts. The court: The court having intimated to counsel during the trial of the case, or after the plaintiff had introduced her proof, that it was apparent to the court that the only question that would be submitted to the jury would be the question of the negligent order of the conductor or the man in charge of the train, and the court being now of the opinion that the court should submit *the defective condition of the track,* together with the orders made by the conductor or the man in charge of the train, and the court *having surprised counsel for the defendant, the court now offers to open up the case and give the defendant two days to produce any evidence* defendant may have as to whether or not the unblocked switch was defective and dangerous, considering the orders that were made by the conductor or man in charge of the train, and the character and nature of the work that was required to be done by the deceased." To the foregoing offer there was a response by Mr. Sheean. The defendant claimed surprise because at the conclusion of plaintiff's case, and after the motion to direct a verdict on the part of the defendant was made, the court permitted the plaintiff to open up its case for the purpose of amending *its petition to allege a negligent order,* and, if they deem fit, introduce testimony showing negligence in the giving of an order of that character, and ruled that there was no other issue to submit to the jury. The defendant was then prepared with witnesses coming from Denver and other points to maintain the proposition that there was no question of negligence to go to the jury as to the condition of the frog in question, and "by reason of the intimation made by the court along the lines above suggested this defendant introduced no testimony along that line and permitted its witnesses to return home; that the defend-

ant is now unprepared to introduce this testimony, and will not be able to do so by day after tomorrow, which is Wednesday." The response further gives as a reason for the continuance that the witnesses reside at distant points; that the affiant is himself engaged to try other cases for the Union Pacific Railroad set for hearing on May 31, and also on June 2. The response of Mr. Sheean is supported by Mr. Sheean's affidavit that he had the sole charge of the case, being the only attorney representing the railroad company who is familiar with the details of the case; that defendant made elaborate preparations to meet the issues presented in the original pleadings; that the pleadings contain only the allegation that defendant was negligent in maintaining an unblocked frog, and that it was the custom of said defendant to maintain its frogs in a blocked condition, and that therefore the said defendant was responsible to the plaintiff; that the court stated and gave this defendant to believe that on this particular feature of the case the motion would be sustained, and the question as to whether or not the maintenance of the frog could be considered as negligence would be withdrawn from the jury. In passing upon the motion, however, the court intimated that there might be a question of fact as to whether or not there was a *negligent order given by the witness Boynton,* representing the master, to the decedent, Richelieu, but the consideration of this *particular feature* of the motion was left open until the *close of the case;* that the defendant, relying on this position assumed by the court, introduced evidence only on the question of whether or not there was a dangerous place at the point where the injury occurred, and whether or not there were circumstances justifying the proposition that there might be negligence in the giving of the directions by Boynton to Richelieu in the disposition of the train at Valley; that this testimony on the part of defendant took less than an hour to introduce, whereas such defendant had made preparations to introduce testimony as to the negligence of the defendant in maintaining the frog as contended, said defendant having witnesses from Denver and other distant

points to substantiate the proposition that there was no negligence in this record; that, upon the position taken by the court in leading the defendant to believe that this issue would be withdrawn from the jury, these witnesses were permitted to return to their homes; that the defendant had this very frog itself removed from the tracks at Valley and shipped to Omaha for the purpose of introducing it as an exhibit in this case, and, acting upon the assurance of the court, testimony of the defendant was limited to the question of a negligent order, and the witnesses aforesaid were permitted to leave on this assurance, and the frog in question, not being any longer needed, *on the issue of a negligent order,* was returned; that the case was finally closed, and this defendant renewed its motion and directed its argument and cited authorities to the single proposition of whether or not there was a question of fact to be submitted to the jury as to the presence in the case of a negligent order; that the consideration of the motion was postponed from Friday, May 26, to this A. M., Monday, May 29, 1911, when the court intimated that he found no facts to submit to the jury on a negligent order, *but had concluded to send the case to the jury on the question of whether or not the maintaining of the frog in an unblocked condition was negligent.* It is further set up in the affidavit that the defendant's witnesses, naming some of them, live at distant points; that their testimony is material, "under the theory as now adopted by the court, * * * and the defendant cannot safely proceed to trial under the new issues now injected into the lawsuit." The affidavit also alleged that the affiant is counsel for the Union Pacific in a case to be tried on the 31st of May, 1911, before Judge Hanna, at Greeley Center, Nebraska, and in another case to be tried June 2, before Judge Grimes, at Lexington; that both these cases required technical knowledge with reference to laws passed by congress affecting Union Pacific Railroad property and involving the width of its right of way, and not possessed by other counsel employed by the company, and that it is impossible for affiant to try the case on Wednesday.

In opposition to the contention of Mr. Sheean and his affidavit, there is the affidavit of Mr. Nelson C. Pratt, the attorney for the plaintiff, but the matters for which he contends do not seem to justify the ruling of the court in denying the continuance. It would seem from Judge Sutton's statement that he changed his views during the progress of the trial, and that he concluded that the alleged defective condition of the track was material, and for that reason he offered "to open up the case and give the defendant *two days* to produce any evidence defendant may have as to whether or not the unblocked switch was defective and dangerous, considering the orders that were made by the conductor or man in charge of the train, and the character and nature of the work that was required to be done by deceased." This leads to the conclusion that there *was* a change in the policy of the court, and, if the defendant actually had witnesses touching this question and they were ready to testify to these material matters and to testify in favor of the defendant, then the defendant suffered because of the refusal of the court to continue the case. The trial judge thought this change sufficiently material, so that the defendant should be allowed to produce its witnesses, and therefore he made the offer. The questions whether the defendant had adopted the custom of blocking frogs and had caused them all to be blocked in the yards at Valley, and whether it had allowed this particular frog where the accident occurred to become defective, so that such defective condition was the proximate cause of the injuries, were important questions, and the parties should have been allowed a full investigation.

Section 1, ch. 39, laws 1911, provides the grounds upon which a continuance shall be granted in the district court: (1) The motion shall set out the grounds on which the application is made. (2) It shall be supported by the affidavit or affidavits of persons competent to testify as witnesses. (3) The adverse party shall have the right to file counter-affidavits. (4) Upon obtaining leave of the court either party may introduce oral evidence. (5) There shall be no reversal by the supreme court on ac-

count of the action of the lower court in granting or refusing such application except "when there has been an *abuse of a sound legal discretion.*" As the witnesses had been permitted to separate and had returned to their homes, many miles distant from the place of the trial, it hardly seems practicable that they could have been secured upon the short notice of only *two days.* We believe the denial of the continuance to have been an abuse of a sound legal discretion. If there had been no showing that the defendant expected to be able to procure the attendance of the witnesses, there would have been no error in refusing the continuance, and the contrary must be true where a showing is made as in this case. *Johnson v. Dinsmore,* 11 Neb. 391. In that case this court endeavored to lay down a rule as follows: "It is said that an application for a continuance is addressed to the sound discretion of the court, and that its action thereon *cannot be reviewed.* But this is stating the rule too broadly. The object of the law is to administer justice, and where it clearly appears from all the facts and circumstances in the case that there has been an abuse of discretion operating to the prejudice of the party in the final determination of the case, the court, in a proper case, will grant a new trial. If it were not so, a party might be entirely defeated in his cause of action or defense for the lack of material testimony, which a continuance would enable him to procure."

Was the plaintiff dependent upon the deceased? She was 34 years old at the time of the accident, and was the owner of the old home in which the family had lived. While she got $1,000 in money from her father's estate, she expended it in fixing up this place. She had a total of about $5,000 in money in addition to the homestead. She rented the homestead for $30 a month, but out of this there were some expenses to pay, including taxes and water rent. At the time of her brother's death she was working for Dr. Lemere, for whom she began to work in 1909. She at first earned $5 a week, but was getting $9 a week when the brother died. She had worked 20 months in the doctor's office. The brother lived with her in the old house, giving

her an amount of money each month which was somewhat uncertain, but about $30 to $40. He also paid her board while she kept the house. They ate at the sister's next door. "Q. Who paid for your board? A. My brother Harry, and then he gave me $35 or $40 besides paying my board. * * * Q. What else, if anything, did he do for you in the way of maintaining you, besides giving you the money, Miss Richelieu? A. Why, if I would get a new dress he would help me pay for it. If I wanted a dollar at any time he would give it to me. * * * We lived there together and he paid the gas bill and telephone. * * * Q. Did he give you money to buy your clothes with? A. All the time; yes, sir. * * * Q. Now, how was your health then, and how is it now, Miss Richelieu? A. Well, I have never been very strong. Up to the time I was 18 years old they were afraid to have me even wipe the dishes. Q. Have you an impediment in your speech that affects your getting a position? A. I have. Up to the time I was 16 I could not move my tongue when I spoke. Q. And you have an impediment in your speech now? A. I have."

That her brother gave her substantial assistance is apparent from this testimony. She had a home and also about $5,000 in money, and she had a position which paid her $9 a week. She was dependent upon the assistance of her brother, although not without means. She could recover her pecuniary loss only. *Michigan C. R. Co. v. Vreeland,* 227 U. S. 59; *American R. Co. of Porto Rico v. Didricksen,* 227 U. S. 145; *Gulf, C. & S. F. R. Co. v. McGinnis,* 228 U. S. 173. In *Gulf, C. & S. F. R. Co. v. McGinnis,* it was said in the syllabus: "The employers' liability act of 1908, as heretofore construed by this court, is intended only to compensate the surviving relatives of a deceased employee for actual pecuniary loss sustained by his death." If we apply this doctrine to the instant case, it must be seen that the plaintiff has a meritorious case. The following cases seem to support the view we have expressed: *Goff v. Supreme Lodge Royal Achates,* 90 Neb. 578; *Illinois C. R. Co. v. Doherty's Adm'r,* 153 Ky. 363, 155 S. W.

1119; *Daly v. New Jersey Steel & Iron Co.*, 155 Mass. 1; *Martin v. Modern Woodmen of America*, 111 Ill. App. 99; *McDaniels v. Royle Mining Co.*, 110 Mo. App. 706; *Fitzgerald v. Union Stock Yards Co.*, 91 Neb. 493; *Welch v. New York, N. H. & H. R. Co.*, 176 Mass. 393; *McCarthy v. Supreme Lodge New England Order of Protection*, 153 Mass. 314; *Houlihan v. Connecticut R. R. Co.*, 164 Mass. 555; *Wilber v. Supreme Lodge New England Order of Protection*, 192 Mass. 477. The plaintiff was clearly dependent on the decedent.

Instruction No. 1, requested by the defendant, reads: "You are instructed that, if you find from the evidence the plaintiff, Charlotte H. Richelieu, was able to make her own living at the time of the death of the deceased, Harry E. Richelieu, she cannot recover in this case." It is contended by the defendant that it was error to refuse this instruction. We are unable to take that view of the matter. Whether she was dependent upon the brother depends upon the aid that he gave her. The evidence shows that he rendered her aid almost continuously.

The defendant should have been permitted to present to the jury its theory of the case. This was in effect denied by the refusal to grant the continuance. For the reasons stated, the judgment of the district court is reversed.

REVERSED AND REMANDED.

REESE, C. J., ROSE and FAWCETT, JJ., dissent.

ROBERT W. BUCHANAN, APPELLEE, V. HENRY F. WILSON ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,829.

1. **Contracts: RESCISSION: EQUITABLE RELIEF.** Where the defendant represented to the plaintiff that the land he was about to trade to him for a valuable farm was of much greater value than it actually possessed, and the plaintiff was thereby induced to trade with the defendant, greatly to the plaintiff's disadvantage, and

to deliver to the defendant a property greatly exceeding in value the consideration received, and the plaintiff was dependent upon the defendant for the information upon which he relied in making the trade, such judgment should be rendered as in equity and good conscience the evidence demands.

2. ———: ———: FRAUD: MENTAL CAPACITY. The plaintiff, although not wholly insane, was shown to be mentally weak and a man of poor judgment, and in such case if the weak mental condition of the plaintiff enabled the defendant the better to take advantage of the plaintiff, and he did take advantage of him, and thereby fraudulently acquired the plaintiff's property for much less than its true value, the contract should be rescinded at the plaintiff's request, and the plaintiff should recover his property; and it will be immaterial whether the plaintiff was wholly insane at the time the trade was made.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Genung & Genung, William H. Pitzer and *Edwin Zimmerer,* for appellants.

George W. Berge, contra.

HAMER, J.

The defendant Henry F. Wilson, with the other defendants, appeals from a decree of the district court for Otoe county, entered August 31, 1912. On the 1st day of April, 1911, the defendant Henry F. Wilson entered into a contract in writing at Lincoln, Nebraska, with the plaintiff, Robert W. Buchanan, by which he undertook to convey to plaintiff 1,960 acres of land in Brown county, Nebraska, in exchange for 160 acres of land in Otoe county, Nebraska. The papers relating to the transaction were to be left at the City National Bank to be turned over to the respective parties on March 1, 1912. Each party to the contract was to have the right to sell the land which he was to receive, but was not to be allowed to give possession until the 1st day of March, 1912. On the same day that the said contract in writing was executed and delivered, the said plaintiff and his wife, Ida L. Buchanan, executed a warranty deed to Henry F. Wilson for 160 acres of land

in Otoe county, Nebraska. The defendant Henry F. Wilson and his wife, Loma C. Wilson, executed a warranty deed to the plaintiff, Robert W. Buchanan, for the 1,960 acres of land in Brown county, Nebraska, which was conveyed subject to a mortgage of $2,650 assumed by the said plaintiff, Robert W. Buchanan. The deeds executed by the respective parties and their wives were deposited in the City National Bank in Lincoln, Nebraska, for delivery March 1, 1912. In May, 1911, the defendant Henry F. Wilson and the plaintiff, Robert W. Buchanan, went together to the bank and withdrew the deeds. The defendant Henry F. Wilson took the deed which had been made to himself, and the plaintiff, Robert W. Buchanan, took the deed which had been made to himself. Wilson had the deed recorded for the Otoe county land in Otoe county, and the plaintiff Buchanan had the deed recorded for the Brown county land in Brown county. May 23, 1911, the plaintiff, Robert W. Buchanan, and his wife, Ida L. Buchanan, executed and delivered to the defendant Henry F. Wilson a warranty deed to the land in Otoe county without reservation of possession, and this deed was recorded May 25, 1911, in Otoe county, and on May 26, 1911, the defendant Henry F. Wilson and his wife gave a mortgage on the Otoe county land to the defendant J. G. Wadsworth, to secure the payment of a loan of $3,000 then made by said Wadsworth to said Wilson. This mortgage was on the same day assigned by the said Wadsworth to the defendant the Mutual Benefit Life Insurance Company. It is claimed by the plaintiff that the second deed above mentioned was executed and delivered by the plaintiff and his wife at the request of the defendant Henry F. Wilson, and for the purpose of relieving the record title of the Otoe county land from the reservation of possession during the time to elapse prior to March 1, 1912, and so that the defendant, Henry F. Wilson, could procure a loan of money from Wadsworth, using the land as security to obtain the same. The plaintiff, Buchanan, gave his note for $875, to become due March 1, 1913, with interest at 4 per cent. per annum after March 1, 1912. This note appears to have been paid

by the plaintiff, Robert W. Buchanan, to the defendant Henry F. Wilson; Wilson discounting it about $87. The delivery of the deeds before the time fixed by the contract and the execution and delivery of the second deed by the plaintiff, Robert W. Buchanan, to the defendant Henry F. Wilson did not change the rights of the parties. The original agreement was in any event carried out.

On October 26, 1911, the plaintiff commenced this action by filing his petition in the district court for Otoe county, Nebraska, against the defendants. Subsequently an amended petition was filed. It alleges that the said Wilson, for the purpose of inducing the said plaintiff to make the said trade, falsely stated that the said Brown county land had a market value of $12 an acre, and that it could be sold for that sum without difficulty; that land similar to this particular land was selling at from $10 to $15 an acre; that a large part of this land was fit for cultivation, and that there was little or no sand on it; that it could be used for both winter and summer pasture; that the soil was perfect, and that the land could be rented for $700 a year; that if it was not worth $12 an acre to the said plaintiff, Robert W. Buchanan, and could not be sold for that sum, the said defendant Henry F. Wilson would be willing to trade back; that the plaintiff had no knowledge of the quality or value of the land, and so told the said Wilson, and that the plaintiff relied upon the representations which were made to him by Wilson in reference to the land, and in reliance upon the representations of said Wilson the said plaintiff entered into the said contract; that the delivery of the deeds in advance of the time stated in the contract was fraudulently procured by the defendant Henry F. Wilson for the purpose of incumbering the Otoe county land before the plaintiff Buchanan could ascertain the character and value of the said Brown county land; that the defendant Wilson had given a mortgage upon the Otoe county land, and that this was done fraudulently, and the plaintiff was unable to state whether the mortgagee was an innocent holder of said mortgage, but, if he was an innocent holder, then

a personal judgment was asked against the defendant Wilson for the amount of the mortgage, $3,000; that the plaintiff, Robert W. Buchanan, tendered a deed of the Brown county land into court, whereby he proposed to place the defendant Henry F. Wilson in the same condition that he was before the trade was made. There was attached to the amended petition a prayer for a decree declaring the deeds of exchange and the mortgage on the Otoe county land fraudulent and void, and requiring a reconveyance by the defendant Wilson, or, in default thereof, judgment against him, the same to be a lien upon the Brown county land.

The original petition was filed by the plaintiff, Robert W. Buchanan, in his own name and upon his own account, but the amended petition was in the name of "Robert W. Buchanan, by Ida L. Buchanan, his guardian," and alleges, as additional grounds for maintaining the case, the incapacity of the plaintiff to transact business, and the appointment on December 2, 1911, of Ida L. Buchanan as the guardian of the plaintiff; that the said Ida L. Buchanan was appointed the guardian of the plaintiff by the county court of Lancaster county, Nebraska, on the 2d day of December, 1911; that during the months of March, April, and May the plaintiff evidenced a total want of reason and understanding in business affairs, and that his condition was perceptible to any one transacting business with him, and that he was of unsound mind. It was also alleged that the plaintiff, at the time of making said contract, stated to the defendant Henry F. Wilson his lack of knowledge of the Brown county land, and also told the said defendant that he was himself then incapable of contracting with him and of protecting himself in the transaction; that the Brown county land is not worth to exceed $3 an acre, and the rental value does not exceed $50 a year; and that, if the transaction be not annulled, the plaintiff must lose $15,000. It is also alleged that the title to said Brown county land was not merchantable, because the patent to a part of the same had not been delivered, and also because of a judgment which clouded the

title, and also because of an irregular foreclosure proceeding in which the complaint was that no notice of sale had been issued; that the plaintiff did not learn the true condition of things pertaining to said land until the defendant Henry F. Wilson had procured said deed and said money and had executed the said mortgage, and not until the entire matter was closed up. The amended petition makes J. G. Wadsworth and the Mutual Benefit Life Insurance Company parties defendant.

The prayer attached to the amended petition is for a decree declaring the contract mentioned, the deed of exchange, and the mortgage and its assignment to be fraudulent and null and void, that a reconveyance of the Otoe county land to the plaintiff be required, and for judgment for $787, the amount paid the defendant Henry F. Wilson by the said plaintiff, or, in the alternative, if it be found that said mortgage was valid, that judgment be entered in favor of the plaintiff and against the defendant Henry F. Wilson for the amount thereof, the same to be declared a lien upon the Brown county land.

An answer was filed on behalf of the defendants Henry F. Wilson and Loma C. Wilson. The defendants J. G. Wadsworth and the Mutual Benefit Life Insurance Company filed answers. The defendants Henry F. Wilson and Loma C. Wilson answered that they were husband and wife and alleged that the plaintiff and his wife, Ida L. Buchanan, entered into the contract, admitted that the defendant Henry F. Wilson had been the owner of the Brown county land, alleged that deeds were executed by the plaintiff and wife to the defendant Henry F. Wilson, conveying the plaintiff's Otoe county land to the said defendant Wilson, and also that deeds were executed to the plaintiff which conveyed the defendant's Brown county land to the said plaintiff, admitted that the deeds were by agreement left at the City National Bank in Lincoln, Nebraska, as alleged in the petition and as provided by the terms of said contract, and that later, in May, 1911, the deeds were delivered to the respective grantees; that later a second deed of conveyance was made by the said plaintiff and his wife

to the defendant Henry F. Wilson, for the plaintiff's Otoe county land, without reserving the right of possession of said land until March 1, 1912; that in the month of May, 1911, the defendants placed a mortgage upon the Otoe county land for $3,000 to the defendant, J. G. Wadsworth, and that the said mortgage and the note accompanying the same had been assigned to the defendant the Mutual Benefit Life Insurance Company; that the amount of the note given by the plaintiff for the remainder due the defendant on the contract was $875, and that the note was afterwards discounted about $80 and paid by the plaintiff. All allegations of fraud were denied. It was also alleged that the plaintiff Buchanan is a retired farmer, and from his observation and experience was well acquainted with the value of farm and ranch land in Nebraska; that prior to April 1, 1911, the plaintiff made a careful examination personally of every part of said Brown county land, and also made inquiry of disinterested men living in the neighborhood of the land, and who were acquainted with it, and that he took special pains to inform himself; that after this investigation was made, and the said defendant had also personally examined the plaintiff's Otoe county land, the transfer was made at the plaintiff's own solicitation; that both tracts of land were valued at *trading prices,* and that the price of the Otoe county land was more exaggerated than the price of the Brown county land; that the Otoe county land was worth less than $15,000 when the trade was made; that the delivery of the deeds in advance of the date fixed in the contract was by mutual agreement, and that the plaintiff Buchanan knew that the defendants were intending to borrow money on the Otoe county land, and the second deed was for the purpose of enabling them to do so, and that the plaintiff made no objection thereto, but assisted the defendants to make the arrangement to borrow the money; that no change of possession was in fact made, and that the plaintiff Buchanan, by his tenant, continued in possession of the Otoe county land and received the rents and profits therefrom for the year 1911,

and that the defendants took possession, by their tenant, March 1, 1912.

The defendants Wadsworth and the Mutual Benefit Life Insurance Company set up the good faith of the transaction, and deny any knowledge of any mental or physical condition on the part of the plaintiff affecting his power to contract and convey land. They deny that the loan on the land was fraudulently made or for any illegitimate purpose, and say that the transaction was in good faith. They also deny all infirmities of title. The reply filed by the plaintiff is a general denial.

The evidence tends to show that the Brown county land had been occupied and owned by a family named Brill, from whom the defendant Henry F. Wilson acquired it. It would seem that the cost of the land to the defendant Wilson was about $17,650 in trade. He put in some land near Lincoln at a valuation of $10,000, and a house and lot in Lincoln at $5,000, and gave a mortgage back on the land for $2,650. This evidence concerning the trade for the Brown county land by the defendant Wilson is not seriously controverted, but it is insisted that the values were fictitious. There were two dwelling-houses on the premises, a barn, a granary, a buggy shed, a concrete cave, and an inclosure fenced for an orchard, which was "hog tight." A creek ran through the land, and on this creek there was considerable timber growing, and that part of the track skirting the creek furnished excellent pasture. Some of the land is described as "pretty fair hay land." Most of the witnesses described the land as smooth, except the bluffs near the creek. The soil is described as sandy loam and capable of being farmed, and wholly without alkali. These facts are gathered from an examination of the bill of exceptions. The land is six miles from Johnstown, in Brown county, and five miles from Wood Lake.

The plaintiff Buchanan and the defendant Henry F. Wilson both lived in Lincoln, Nebraska, at the time the trade was made. Wilson had been a farmer in Iowa, and moved from there to Lincoln. The plaintiff had been a farmer in Otoe county, and lived in Syracuse, Nebraska. He had

bought and sold at least one farm before his trade with Wilson. The plaintiff's wife objected to disposing of the Otoe county farm. The plaintiff and the defendant Wilson went to see the Brown county land before they traded. They drove out to the ranch in company with Mr. A. G. Holt, a banker of Johnstown. The plaintiff talked with the banker Holt, and also with McDowell, who lived on an adjoining ranch, and with Mrs. McDowell. The talk was all about this particular land and about the country. Before that the plaintiff and the defendant Wilson had been to see the Otoe county farm. After the plaintiff and the defendant Wilson got back from the trip to see the Brown county land, they separated at Lincoln, and about a week afterwards they made the contract in writing relating to the proposed trade. The plaintiff and his wife met the defendant and his wife at a real estate office, when the trade was made. The parties then went together to the City National Bank, where the deeds were deposited. Buchanan had given a note to the defendant Wilson for "boot money" in the sum of $875. It was discounted, Buchanan paying the money. Wilson wanted to borrow money on the Otoe county land. The plaintiff and his wife, at the defendant's request, executed and delivered to him a deed for the Otoe county land. This was to make it satisfactory to Wadsworth, who was making the loan on that land.

The Brown county ranch was very unsatisfactory to plaintiff's wife. She left the next day after seeing it. The plaintiff stayed a while. Mr. Bell testified: "Q. Did he indicate what his plans were or anything like that? A. He thought he would go up there—move onto the ranch and run it himself—probably take the boys with him, if he didn't sell it." He also testified that the plaintiff listed the land with him. At the time he did so, he prepared a description of the land to be presented to proposed purchasers, in which the land is described as situated on Evergreen creek, six miles northwest of Johnstown, and four miles northeast of Wood Lake, and all under fence with barbed wire and burr oak posts.

On November 29, 1911, Mrs. Buchanan's application to the county court of Lancaster county for an appointment of herself as guardian of her husband was heard, and on the 2d day of December, 1911, the appointment was made.

The district court held that the papers were obtained from the plaintiff by fraud; that no lien was obtained by the defendant Wadsworth and none by the insurance company, but that Wadsworth loaned the money in good faith, and that the insurance company should have a mortgage lien upon the Brown county land to secure the payment of the loan, and that the amount paid by the plaintiff to Wilson, after deducting the discount made, was $787, which the plaintiff should recover from Wilson. The title to the Otoe county land was quieted in the plaintiff, and all interest of the plaintiff in the Brown county land was decreed to belong to the defendant Wilson, subject to the lien of the insurance company for the amount of the loan made upon the Otoe county land. The case was heard before Judge Travis July 8, 1912. The decree "finds the issues generally in favor of plaintiff and against the defendants, and that the allegations of plaintiff's amended petition are true." It was further found that the contract, deeds, the $875 note, the $3,000 note and mortgage to Wadsworth, and all the papers pertaining to the transaction "were each and all executed by the plaintiff, Robert W. Buchanan, and wife, Henry F. Wilson and wife, and J. G. Wadsworth, while Robert W. Buchanan was not able to appreciate the consequences of his acts and while of unsound mind, and are null and void, and that all of the transactions between the plaintiff and Henry F. Wilson were also fraudulent and null and void, and all of said instruments are canceled and set aside."

As we understand it, the plaintiff was not "insane," according to the usual acceptation of the term. Insanity is a mental symptom or manifestation of physical disease which impairs the understanding, so that one or more faculties of the mind is perverted, weakened, or destroyed. *In re Estate of Ayers,* 84 Neb. 16. This man does not appear to have been wholly insane, but the evidence justi-

fies the conclusion that he was weak-minded and had poor judgment, and that Wilson took an unconscionable advantage of him.

To review the finding of the district court, we may briefly say that there was evidence tending to show that the use of the land was not of greater value than $50 a year. The defendant Wilson claimed it was worth $700 a year. There were some improvements on the land, and a part of it at least appears to be capable of being farmed. Many witnesses testified as to its value, and their estimates were so different that it would be impossible to discriminate between them and to judge of the value of their opinions without seeing them upon the witness-stand and hearing their testimony. The trial court had this advantage, and has practically found that there was such a discrepancy between the values of these respective tracts as to justify a general finding for the plaintiff, in view of the whole evidence taken in the case, and we are satisfied that this finding is fully warranted by the evidence.

If the weak mental condition of the plaintiff enabled the defendant Wilson to take advantage of him, and he did so, and thereby fraudulently acquired the plaintiff's property for much less than its true value, the contract should be rescinded, and the plaintiff should recover his property. It is immaterial whether the plaintiff was wholly insane at the time the trade was made, if his condition mentally was such as to permit the defendant to take advantage of him and to acquire his property for an insufficient consideration. It is proper for us to remember that the trial judge saw the witnesses and had an opportunity to judge of them by what he saw of them, and he also heard them testify, and for that reason he had an opportunity to form his conclusion as to whether they were telling the truth and the force and effect of their evidence. In any event his opportunity was better than ours. While we are not bound by the findings and judgment of the district court, it is our duty to make such findings and to ren-

der such a judgment as the evidence sustains and the law demands. The judgment of the district court is

AFFIRMED.

REESE, C. J., and ROSE, J., not sitting.

KATIE MAUDER ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1914. No. 18,648.

1. **Criminal Law**: APPEAL: AFFIRMANCE. Where the evidence upon the trial of a case is in direct conflict upon every material controverted fact, the verdict of the jury should not be overturned if there is sufficient evidence to support it. *Witt v. Caldwell*, 95 Neb. 484; *First Nat. Bank v. Hedgecock*, 87 Neb. 220.
2. **Assault and Battery**: INSTRUCTIONS. Instructions given, examined and sustained, as also the refusal to grant requests for instructions.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Berge & McCarty, for plaintiffs in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

HAMER, J.

The plaintiffs in error, Katie Mauder, Marie Greenamier, and Marie Folz, were charged with a simple assault and found guilty. They appeal from the district court for Lancaster county. The complaint was filed October 31, 1913, before W. T. Stevens, a justice of the peace in Lancaster county, charging an assault upon Paulina Schwint. There was a change of venue to John E. Lowe, a justice of the peace, and before him and a jury there was a trial in which the three plaintiffs in error were found guilty, along with Natalia Meisner; and Mrs. Folz and three other defendants, Jake Mauder, Peter Greenamier, and Conrad Beck were acquitted. On appeal to the district court the

three plaintiffs in error mentioned were tried before the court and a jury, and were again convicted. Each was sentenced to pay a fine of $1 and costs. The case has been given great consideration and much labor by counsel for the plaintiffs in error, whose printed brief covers 79 pages. The state also has been well represented by the attorney general's office. The bill of exceptions contains 368 pages of testimony. We have read the briefs and have given a good deal of careful study to the evidence.

The prosecutrix testified that she was in her back yard when she was surrounded by the defendants. There seem to have been five women and two men. One of these women, Mrs. Mauder, caught her by the shoulder. They were violent in their demonstrations. She says she was scared, and that she ran to the barn for protection. She opened the barn door and closed it behind her and hooked it fast on the inside. There is no dispute about the fact that these women, and at least one of the men, picked up clods, tin cans, bricks and stones and threw them against the barn. It is claimed they broke the window. They said, in substance: There is a man in there. Paulina Schwint has a man with her in the barn. They said it aloud, so that she could hear and that they had sent for the police, and would have them there in five minutes. They said this a great many times. Mrs. Schwint's testimony is corroborated by the testimony of numerous other witnesses who appeared on behalf of the prosecution. Her evidence is disputed in part by the four women who were tried and by one of the men. As there is a conflict of evidence, we do not feel justified in overturning the verdict of the jury. The verdict might have been the other way, but there is evidence sufficient to sustain it.

In *Witt v. Caldwell,* 95 Neb. 484, this court declared in the syllabus: "The evidence upon the trial of this case was in direct conflict upon every material controverted point of fact. In such case the verdict of the trial jury upon the conflicting evidence, if there is sufficient to support it, will not be molested."

In *First Nat. Bank v. Hedgecock,* 87 Neb. 220, this court said in the syllabus: "The verdict of a jury will not be set aside for want of evidence to support it, if there is a substantial conflict of evidence upon the issue presented."

Under the rule stated, we are bound to affirm the judgment of the court below, unless there is prejudicial error in the instructions given or in some other of the proceedings in the case.

We have carefully read the requests for instructions. We think that those refused were properly refused. Our attention is not called to any specific reason why these requests should have been given. They are as follows:

"Instruction No. 2. The court during the progress of the trial has allowed Mrs. Paulina Schwint, the complaining witness, to testify what she told other parties after she alleges she came out of the barn, concerning what the defendants said and did; also the court has permitted testimony of parties other than the defendants to testify what Mrs. Paulina Schwint told them after she says she came out of the barn. All of this conversation was had between the complaining witness and these parties in the absence of the defendants. This is undisputed in the record. Also, all of this conversation took place after all of the defendants had left the Schwint lot. The court now holds that these conversations are not a part of the *res gestæ,* and all of it is now withdrawn from the jury, and you are not to consider it in any way, and you are to consider this case just as though you had heard none of this testimony. Refused.

"Instruction No. 3. You are instructed that, before you can find defendants guilty, the evidence must establish their guilt beyond a reasonable doubt. Mere suspicion of guilt, however strong, or a preponderance of all the evidence in the case against the defendant, will not do upon which to base a verdict of guilty. A reasonable doubt is a term often used, probably well understood, but not easily defined. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot

say and feel that they have an abiding conviction to a moral certainty of the truth of the charge. If upon the proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the facts charged are more likely to be true than the contrary, but the evidence must establish the facts to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond a reasonable doubt. Refused.

"Instruction No. 4. You are instructed that, if the defendants, at the time and place charged in the complaint, believed that tramps or other trespassers had gone upon the property of their neighbor, Mrs. Schwint, and had gone into her barn, it was not unlawful for those defendants to go to the barn and upon the premises of Mrs. Schwint, for the purpose of extending to her friendly aid and protecting her property against marauders, and if in so doing the defendants, or those with them committed acts that otherwise might constitute an assault upon the complaining witness, Paulina Schwint, and did such acts before learning the identity of the person, and before knowing that their acts were directed against said Paulina Schwint, and that as soon as they became aware of the identity of said person, and that it was Paulina Schwint, the defendants desisted in their conduct and departed from said Paulina Schwint, and her premises, then the defendants were not guilty of any offense. Refused."

"Instruction No. 6. Should the jury believe beyond a reasonable doubt that the defendants gathered about Paulina Schwint, at the time and place alleged in the complaint, though the conduct of the defendants may have shown that they were laboring under excitement and may have frightened said Paulina Schwint, and at said time said Paulina Schwint may have believed the defendants intended to do her harm and injury, yet, unless the jury believe beyond a reasonable doubt that the defendants did

such acts with the intention of harming or injuring said Paulina Schwint, they must find the defendants not guilty. Refused."

We have also read the instructions given by the court upon its own motion. They seem to be justified by the facts as shown by the evidence. Each of the instructions given by the court upon its own motion is excepted to. We have read all of these instructions, and will briefly state the contents of such of them as we do not copy.

The first instruction is simply a description of the charge made, and the statement that the defendants made a plea of not guilty.

The second contains a definition of an assault. It defines it as "an attempt with unlawful force or threats made in a menacing manner to inflict bodily injury upon another accompanied with the present ability to give effect to the attempt." It also contains the idea that the person who attempts to strike, touch or do any violence to another must have the "intention and the apparent present ability to do such violence" before he can be guilty of the assault.

The third is concerning the presumption of innocence. It is stated in it "that the law presumes the defendants to be innocent until they are proved guilty beyond a reasonable doubt. The plea of not guilty casts upon the state the burden of establishing by evidence all the material allegations in the indictment beyond a reasonable doubt."

The fourth instruction tells the jury that they may find some of the defendants guilty and acquit others. It also tells the jury that, if they were all actuated by a common purpose to commit the assault, then they are all guilty, although only one of their number may have taken hold of the prosecuting witness.

The fifth contains a definition of reasonable doubt. The instruction as given might have been written in better and clearer language, but it does not appear to be prejudicial. It reads: "A reasonable doubt is that state of the mind which, after an entire comparison and consideration of all the evidence, giving due and proper weight and credibility

to it, leaves the mind in such condition that you cannot say that you feel an abiding conviction, to a moral certainty, of the guilt of the accused. By a reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against them, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence or want of evidence in the case. Given."

We do not deem the sixth instruction prejudicial. If it is wrong, it is favorable to the accused. They may not complain of it, because its effect before the jury could not well be otherwise than to point toward an acquittal. It reads: "You are instructed that, to constitute the offense of assault with which these defendants are charged, an intent to do injury or harm or some other unlawful act toward the person assaulted is necessary. Acts which may be sufficient to constitute an assault, if done without any intent to do harm or injury to another, or, if not done in the perpetration of some other unlawful act, do not constitute an assault; and, before one can be found guilty of an assault, the jury must believe beyond a reasonable doubt that the acts constituting the assault were committed with such intent to do harm or injury to the person assaulted, or else done in the perpetration of some other unlawful act. Given."

The seventh tells the jury that the intent "with which an act is done is a mental process, and, as such, generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence." That may all be true, but it does not appear in what way it is material or prejudicial.

In the eighth instruction the jury are told that the testimony of any witness who wilfully testifies falsely as to a material fact may be disregarded, and that the credibility of the witnesses is for the jury. There are other statements in it concerning the consideration of the conduct, intelligence and fairness of the witnesses and the

reasonableness of the story told by them. This is a sort of stock instruction much used in the trial of cases, and we perceive nothing wrong in it.

The ninth instruction relates to the selection of a foreman.

Several affidavits were filed in support of an application for a new trial. They purport to be based upon newly discovered evidence. Apparently they aim to create the impression that the prosecutrix is an immoral person. That is not the thing to be determined in this case. The question is whether the parties charged are guilty of an assault on Paulina Schwint.

The brief prepared by counsel for plaintiffs in error shows a great deal of labor, but, as we understand it, section 8192, Rev. St. 1913, and the rule of this court which governs the preparation of briefs in such cases are disregarded. The brief wholly fails to make a specific statement of any of the errors sought to be complained of. There are four alleged assignments of error. They seem to be classifications of a subject, but they fail to tell us what is wrong with the proceedings in the case. *Witt v. Caldwell, supra.*

In *First Nat. Bank v. Hedgecock, supra,* it is said in the syllabus: "The statute requires that the brief in this court shall set out particularly the errors asserted, and assignments not so made and definitely discussed in the brief will not ordinarily be considered."

We quote what is offered in the brief. The heading is:

"Propositions of Law.

"1. Wherever an issue is suggested by the testimony which is favorable to accused, the court must instruct the jury on that issue, and a failure to do so is reversible error. * * *

"2. The court must give an affirmative instruction on every theory of the defense. A mere negative instruction will not answer. A failure to do so is reversible error. * * *

"3. If an instruction tendered is faulty or erroneous, yet, if it calls the attention of the court to any theory of the defense supported by evidence, it is erroneous for the court to fail to give a proper instruction covering such theory. * * *

"4. In a criminal case, where an issue is made in the evidence of a defensive character, it is reversible error where there is no instruction expressly authorizing an acquittal."

No specific error is charged in any one of the foregoing subdivisions. In another and different place these subdivisions might not be without merit, but we do not think they are applicable here. Notwithstanding that fact we have read the evidence and studied the case, and find the contention of plaintiffs in error to be without merit.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

SEDGWICK, J., dissents.

MARY YECHOUT ET AL., APPELLEES, V. CHARLES TESNOHLIDEK ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 17,860.

1. **Trial:** OPENING STATEMENT. Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense. The mere fact that he fails to prove all he expected to prove, if true, does not necessarily establish the fact that the statement was intentionally false.

2. **Pleading:** ANSWER: NEW MATTER. "In order to be available in an action, new matter constituting a defense must be pleaded in the answer. It cannot be introduced under a general denial." *Gran v. Houston*, 45 Neb. 813.

3. **Intoxicating Liquors:** ACTION ON BOND: DEFENSE. In an action upon a saloon-keeper's bond for damages for a loss of means of support growing out of the sale of intoxicating liquors to the

husband and father of plaintiffs, the fact that such husband and father was a drinker, or even a drunkard, before the time charged as the beginning of the sales would not of itself defeat a recovery, if liquors sold to him after such time by defendant contributed to keeping him in that condition.

4. **Trial:** INSTRUCTIONS. The action of the court in refusing to give instructions asked by defendants, and which is assigned for error, is examined, and no prejudicial error found.

5. **Constitutional Law:** SLOCUMB ACT. The question of the constitutionality of the act of 1881, commonly known as the "Slocumb Law" (Rev. St. 1913, ch. 40) having been passed upon so often by the courts, and no special reason being assigned in the brief of defendants why or how the act is violative of the constitution, the question is not reexamined.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Alfred G. Ellick and *Albert S. Ritchie* for appellants.

H. C. Murphy and *S. L. Winters, contra.*

REESE, C. J.

This action was commenced by plaintiff, the wife of James Yechout, against defendant Tesnohlidek and one Macek, and the surety on their bonds, as saloon-keepers in the city of South Omaha, for damages growing out of the sale of intoxicating liquors to the husband of plaintiff. A jury trial was had, which resulted in a verdict in favor of defendant Macek and against plaintiff, and in favor of plaintiff and against Tesnohlidek and his surety for $2,000. Judgment of dismissal was rendered in favor of Macek, and judgment in favor of plaintiff and against defendant Tesnohlidek and his surety for the said sum of $2,000, from which he and his surety appeal.

The action was for loss of support and the debauching of plaintiff's husband and the father of their three minor children, who joined in the action as plaintiffs by their next friend, Mrs. Yechout. The petition sets out that from the 1st day of May, 1909, to May 1, 1910, and during the next year until May 1, 1911, defendant Tesnohlidek was a licensed saloon-keeper, with defendant, the Bankers

Surety Company, as his surety, upon the liquor dealer's bond. It is alleged that Yechout, the husband and father, prior to May 1, 1909, was capable of earning, and did earn, the sum of $5 a day, all of which he brought to his home and used, and caused to be used, for the maintenance and support of the family; that from that date until the time of the commencement of the suit defendant Tesnohlidek sold and gave to the said James Yechout intoxicating liquors in large quantities, and at frequent intervals, thereby causing him to be a confirmed and habitual drunkard, and for that reason he has failed to contribute to the support of the said family; that he has become an imbecile, a total wreck, mentally and physically, and that said condition has become permanent, etc. Damages in the sum of $25,000 are alleged, and judgment for that sum is demanded.

Defendant Tesnohlidek filed his separate answer, in which he admitted the allegations as to his being a duly licensed saloon-keeper during the time stated, and that he gave the bond with surety as alleged, and denied all other allegations of the petition. The Bankers Surety Company answered by way of a general denial, and alleged the unconstitutionality of the statute upon which the action is founded, for the reason that the statute violates the provisions of subdivision 3, sec. 8, art. I of the constitution of the United States, wherein it is provided that congress shall have power to regulate commerce among the several states, and also violates that portion of section 1, art. XIV of the constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is also alleged that the law is unconstitutional for the reason that it violates section 3, art. I of the constitution of this state, also portions of section 15, art. III thereof.

1. Of the errors assigned by appellants, the first is that in the opening statement to the jury counsel indulged in inflammatory and baseless appeals to the jury in stating what facts plaintiff expected to prove by the testimony of witnesses thereafter to be introduced. These statements referred to a cupboard, a saw, and a pipe, which, it was claimed, defendants took and received from plaintiff's husband in payment for liquor bills, and also that plaintiff, on account of her husband's drunkenness, locked their children in their home and worked in a packing house in order to maintain the family. It may be remarked that there was some evidence submitted in support of these statements, though in some instances it was slight. In making the opening statements to a jury, the plaintiff is entitled to "briefly state his claim, and may briefly state the evidence by which he expects to sustain it." Rev. St. 1913, sec. 7846. In all cases considerable latitude must be allowed in the statement of what the party "expects" to prove. The fact that he may fail to establish the facts which he may have expected to prove does not necessarily establish the fact that the statement was intentionally false. The incidents referred to, even if not proved, were of a trivial matter, not material to a recovery, and we cannot conceive of any prejudice resulting therefrom.

2. It is next contended that the trial court erred in giving the eighth instruction to the jury. The instruction is as follows: "You are further instructed that it is not pleaded in any of the defendants' answers that plaintiffs consented or acquiesced in the sale or furnishing of liquor by defendant saloon-keepers to James Yechout, or that Mary Yechout herself furnished liquor to her husband, and you are therefore instructed that this would not be a defense to this action, and you are hereby directed to disregard all testimony upon this question." The law of this instruction is fully settled in *Gran* v. *Houston,* 45 Neb. 813, 830, wherein it is said: "The consent or acquiescence of Mrs. Houston to the giving or sale of liquors to her husband was matter constituting an affirmative defense, even if it could be allowed in any degree as a de-

fense, and to be available must have been pleaded, and this was not mentioned in the answer, and could not have been taken advantage of under general denial, hence this assignment is clearly without merit. New matter constituting an entire or partial defense to a cause of action must be pleaded in the answer and cannot be shown or made available under a general denial." As there was no defense of the kind pleaded, we need give no further attention to the subject. It may be said, however, that it was held in *Kliment v. Corcoran,* 51 Neb. 142, that the fact that plaintiff furnished liquor to and drank with her husband constituted no defense to the action. The instruction was correct even upon that theory.

3. It is next insisted that the court erred in refusing to give instruction numbered 5 asked by defendant insurance company. The instruction is as follows: "You are instructed that there can be no recovery by the plaintiffs herein for loss of means of support if you should find that there has been no diminution thereof since May 1, 1909." There was evidence that there was a loss of means of support after the date named in the instruction, but we think this could make no difference under the provisions of sections 3859 and 3862, Rev. St. 1913, of the act known as the "Slocumb Law." While it might be proper for the jury to consider all the circumstances of the case, the fact that the drinker was disqualified before a certain date could not justify the seller of the liquor in keeping him in that condition during a later time.

A number of errors are based upon the refusal to give instructions, all of which we have examined, but find that the questions presented have all been passed upon by this court, and are satisfied that there is no merit in the contentions.

There is no discussion in appellants' brief of why or how the law under which this action is brought is violative of either the constitution of the United States or of this state. Since both the supreme court of this state and of the United States have passed upon the question, we are not called upon to review the many decisions therein. The

law was enacted in 1881, and has been attacked upon every point since *Pleuler v. State,* 11 Neb. 547, decided at the July term of that year, and we must be excused from entering that field, in the absence of specific directions.

Finding no error in the record justifying a reversal of the judgment, it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

ELI H. COX, APPELLANT, V. C. C. ELLSWORTH ET AL., APPELLEES.

FILED DECEMBER 18, 1914. No. 17,890.

1. **Bills and Notes:** PRINCIPAL AND SURETY: PAROL EVIDENCE. In an action by an alleged assignee of two promissory notes, in which it is averred that defendant signed as principal and plaintiff as surety, and each had paid one-half of the debt, the suit being for the recovery of the one-half paid by plaintiff, and defendant answered that they each had signed as surety under an oral agreement that if the notes were not otherwise paid each was to pay one-half, and each had so paid, oral proof of such agreement was properly admitted for the purpose of ascertaining the rights of the parties as between themselves.
2. **Trial:** VERDICT: PRESUMPTION. Where two persons were sued as defendants and the verdict was in favor of plaintiff and against one of the defendants, and silent as to the other, and is received by the court, without objections or question by the parties, and there is sufficient proof to justify a verdict in favor of such defendant, the judgment rendered on such verdict will not be reversed on that ground; the presumption being that the jury found in favor of the defendant not referred to in the verdict.
3. **Instructions** examined, and no prejudicial error found in them.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John C. Stevens, for appellant.

Tibbets, Morey & Fuller and *J. E. Willits, contra.*

REESE, C. J.

This is an appeal from the district court for Adams county. Plaintiff, Eli H. Cox, brought suit against the defendants, C. C. Ellsworth and S. J. Boemer, and alleged in his petition that on the 28th day of June, 1907, the defendants made their two promissory notes to the Clark Implement Company in the sum of $708.50; that about the 1st day of December, 1907, the notes matured; that plaintiff signed said notes as surety at the request of defendants; that at their maturity the defendant Boemer paid one-half thereof, and agreed with plaintiff "to pay the other half as soon as he could;" that the notes were the joint notes of the defendants; that upon the maturity thereof plaintiff was compelled to pay the sum of $365, and took an assignment of said notes from the Clark Implement Company; that no part of said indebtedness had been paid; that said notes drew 6 per cent. interest from the dates thereof; and that there was due from defendants to plaintiff the sum of $365, and interest $93.99. Judgment was demanded for the sum of $458.99, with interest at the rate of 6 per cent. from the date of the petition, and for costs of suit.

Defendant Ellsworth answered by a general denial, and alleged that he was only a nominal party to the transaction; that the notes were given for a threshing outfit, with the express understanding that, if he failed to operate said threshing outfit, then and in that event, upon his return and surrender of the outfit, the transaction would be settled, and he would be relieved from all liability on said notes; that he had long since performed all on his part to be performed; that the consideration for said notes was satisfied and returned, and plaintiff had no cause of action against him; that he returned and duly surrendered said threshing outfit, and thereby satisfied and discharged his obligation on said notes, which are now and have been for the past several years paid and satisfied so far as he is concerned.

Defendant Boemer answered: (1) By a special appearance objecting to the jurisdiction of the court over

him, on the ground that he was not properly joined as a defendant, there being no joint liability between him and defendant Ellsworth to plaintiff on the averments of plaintiff's petition, he being a nonresident of Adams county, and the only service of summons being had upon him was in Nuckolls county, the place of his residence; (2) that, without confessing the jurisdiction of the court over him, he alleged that on June 21, 1907, he, as the local agent of the Clark Implement Company at Lawrence, Nuckolls county, took an order from C. C. Ellsworth for one complete Russell & Company threshing rig, including engine, separator and equipment, for the agreed price of $2,643; that said Clark Implement Company refused to deliver the property to Ellsworth without additional security on the two notes on which this suit is brought, being the first notes to mature, and it was agreed between plaintiff, who represented said company, and this defendant that they each would sign said notes with said Ellsworth as sureties to said company, and on account thereof plaintiff and the answering defendant, on the 28th day of June, 1907, on the delivery of said property to said Ellsworth, each signed said notes as sureties for said Ellsworth, one note thereof being for $125, due September 1, 1907, and one for $582.50, due December 1, 1907; that Ellsworth failed to pay the notes, and plaintiff and defendant on the 18th day of November, 1907, each paid to said Clark Implement Company the sum of $363.70, being the principal and interest on said notes, defendant paying to plaintiff the sum of $21.25, being one-half the commission on said notes. Plaintiff replied to both answers by a general denial.

A jury trial was had, which resulted in a verdict finding for plaintiff and against defendant Ellsworth for the sum of $461.54. There was no finding either in favor of or against defendant Boemer. Plaintiff filed a motion for a new trial, the grounds assigned being a defect in the verdict, because there was no finding in favor of or against Boemer; that the verdict was not sustained by sufficient evidence; that the verdict was contrary to law; for errors

of law occurring upon the trial; for erroneous instructions duly excepted to; and "because of conflicting instructions given by the court to the jury." The motion was overruled, judgment entered upon the verdict, and plaintiff appeals.

The evidence was substantially in harmony with the pleadings, each party testifying in support of the issues presented by him. That the evidence was conflicting may readily be surmised. The two notes described in the pleadings were signed by plaintiff and Boemer, as well as by Ellsworth, the alleged purchaser of the "threshing outfit." The contract of purchase and all the other notes were signed by Ellsworth and Boemer. Plaintiff claims that Ellsworth and Boemer were principals in the purchase, and that he signed the first two notes as surety for both the others, and that, having to pay one-half the amount due thereon, he was entitled to recover that amount from both the others. Boemer claims that he was only a cosurety with plaintiff on the two notes, and, having paid one-half the amount due, and plaintiff the other half, there was no further contribution required from him. Ellsworth seemed to think that he was only a nominal party to the purchase of the thresher, and that by returning it after using it for a time all obligation on his part terminated.

From the verdict it appears that Boemer's contention, as to his relation to the two notes, was found in his favor, viz., that he signed the two notes as surety, and as between himself and plaintiff he had paid all he was liable for, and therefore his name does not occur therein. It goes without saying that the court should not have received the verdict without correction; but it was received without objection from counsel, and we must presume that it was satisfactory to all concerned. We do not see that plaintiff is in any condition to complain. The verdict was a sufficient finding that plaintiff was entitled to a judgment against Ellsworth for the amount which he had paid. Had plaintiff desired a finding as to Boemer, he could have had it by objecting to the form of the verdict.

The court instructed the jury that, if they found from the evidence that, as to the two notes, plaintiff and Boemer agreed as between themselves to assume, each, equal liability, and that each paid one-half of the notes, their verdict should be in favor of defendant Boemer. There was evidence sufficient to justify such an instruction. The court also instructed the jury to return a verdict in favor of plaintiff and against Ellsworth for whatever plaintiff "may have paid as surety on the notes in question, if from the evidence you find that he signed them as surety." These instructions are both criticised as erroneous, on the ground that Ellsworth's contention was that he had nothing to do with the purchasing of the threshing outfit; but we are unable to see the force of the contention, when applied to the relations between plaintiff and Boemer. Whether Ellsworth was the principal on the notes or not, if, as between themselves, plaintiff and Boemer had signed as sureties and under the agreement had fully executed and carried out their plans, each paying one-half, that would end the matter as between them. We can see no objection to the instructions, which could prejudice plaintiff.

This question is propounded by plaintiff: "Did the court err in permitting oral testimony in evidence in relation to the capacity in which Boemer signed the contract and notes?" As between plaintiff and Boemer, we think not. We must remember that the contest in this case is not between the makers and the payee of the notes. So far as the payee is concerned, the notes were paid. The implement company had no further demands. The contest was between the two who had paid the notes in question. Oral proof of the agreement as between themselves was, we think, properly admitted and submitted to the jury.

We are unable to detect any prejudicial error in the judgment which was not waived.

The judgment of the district court is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

TOM CURTIS V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1914. No. 18,745.

1. **Criminal Law**: VERDICT: CONFLICTING EVIDENCE. Where the evidence is conflicting, it is the province of the trial jury to pass upon the testimony, and, unless the finding is clearly wrong, it is final. This rule applies with equal force to the testimony in a criminal prosecution as in a civil suit.
2. **Robbery**: SUFFICIENCY OF EVIDENCE. The evidence is *held* sufficient to sustain the verdict.
3. **Criminal Law**: INSTRUCTIONS: FAILURE TO DEFINE LESSER OFFENSE. "In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do." *Barr v. State*, 45 Neb. 458.
4. ———: ———: INTOXICATION OF ACCUSED. The same rule must be applied when the evidence establishes the fact of the intoxication of the accused and no instruction was requested upon that point.

ERROR to the district court for Dakota county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. J. McAllister and *George W. Leamer*, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

Plaintiff in error, who, for convenience, will hereafter be referred to as defendant, was convicted in the district court for Dakota county of the crime of robbery. He alleges error, and brings the cause to this court for review by proceedings in error.

The information is in the usual form, charging that defendant and one John Gill on the 27th day of October, 1913, robbed John R. Deater of a purse, of the value of 25 cents, and four $20 bills, currency of the United States, the property of the said John R. Deater. The parties ac-

cused were granted separate trials, and defendant was first placed upon trial, which resulted in a verdict of guilty, with judgment and sentence as above indicated.

The theory of the prosecution, as shown by the testimony of witnesses on the part of the state, was that defendant and Gill met Deater in the city of Sioux City, Iowa, and all drank intoxicating liquors until all became highly intoxicated, when they, with one or two others, left Sioux City and came to South Sioux City, in this state, intending to engage in a more degrading debauch in the latter town in visiting houses of prostitution in that neighborhood; that they rode upon street cars to near where they desired to alight, but by some means they failed to leave the car at the desired place for leaving the street car line; that at South Sioux City they entered saloons and completed the filling up process until all were beastly drunk; that after leaving the street car they sought to reach their destination by walking on the public highway; that after following the road some distance defendant and Gill assaulted Deater, got him down, and robbed him of something like $80, left him lying in the road, jumped over a nearby fence, entered a cornfield, where they were soon out of sight, and temporarily made their escape, being captured that evening not far distant from the neighborhood of the alleged crime. It seems that Deater had succeeded in making the regulation fool of himself by his drinking, making himself obnoxious to the Sioux City saloon-keepers by singing in the saloons to such an extent that he, with his associates, had been requested to be less noisy or leave the saloon. It is said that in his intoxication he displayed quite a roll of bills, declared that he was the son of the late Jesse James, and indeed and in fact a wonderful character. He was about 22 years of age, while defendant was about 28 and Gill about 30.

It could serve no good purpose here to recount the facts testified to by the state's witnesses, as there was a conflict upon every material feature of the case, the state's witnesses being flatly contradicted in many particulars, yet, if the state's witnesses testified to the truth, there was

amply sufficient evidence to sustain the verdict. It is well understood by the profession that, where there is a conflict, it is the province of the jury to weigh the evidence and pass on the questions of fact presented. We are satisfied with the verdict, and cannot reverse the judgment on the ground of the insufficiency of the evidence.

Of the errors of law relied upon for a reversal of the judgment, the first is that the district court erred in not instructing the jury that they might find defendant guilty of larceny from the person, or of any one or more of the forms of criminal assault included in the crime charged in the information. It is scarcely necessary to examine this question, for the reason that error cannot be predicated thereon without having called the attention of the trial court to the subject by some form of request for such a charge, and that the better rule is that suitable instructions be prepared and submitted to the court, thereby obtaining a ruling thereon, which, if adverse, would constitute a foundation for review.

The second ground discussed in the brief is that the court erred in not giving an instruction advising the jury on the question of the intoxication of the defendant as affecting criminal intent or as affecting the degree of the offense charged and as an excuse for the crime alleged. Here we are met with the same objection as in the former assignment. No request for an instruction upon that subject was made. The rule is well settled in this state. *Barr v. State,* 45 Neb. 458, and cases there cited. Both contentions are without merit.

Finding no reversible error in the judgment and sentence of the district court, they are

AFFIRMED.

FAWCETT and SEDGWICK, JJ., not sitting.

WILLLIAM NORMAN ET AL., APPELLEES, V. WILLIAM T. KUSEL, APPELLANT.

FILED DECEMBER 18, 1914. No. 17,924.

1. **Waters: OBSTRUCTION OF STREAM: RIGHT TO USE OF WATER.** One whose premises are situated on a stream of water will not be permitted to obstruct the natural flow of the stream in such a manner as to deprive another, who is rightfully in possession of a tract of land situated on the stream below, of water for domestic use, including water for his stock, unless such use will deprive the upper proprietor of water necessary for his own use.
2. ———: ———: ———. Where the testimony clearly shows that the upper proprietor has obstructed the flow of the stream in such a manner as to wilfully deprive another of the use of water for the purposes above mentioned, and that the upper proprietor had no use for the water for irrigation or other purposes, he will be liable for all the damages occasioned thereby. The question of riparian rights does not arise in such a case.
3. **Appeal: AFFIRMANCE.** Where plaintiffs' claim for damages and defendant's counter-claim for trespass by plaintiffs' cattle are submitted to the jury under proper instructions, the verdict will not be set aside, unless, upon the whole record, it appears to be clearly wrong.
4. **Instructions** examined, and found to contain no reversible error.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. W. Crites and *Dolezal & Johnson,* for appellant.

Earl McDowell and *Burkett, Wilson & Brown, contra.*

BARNES, J.

Action in the district court for Dawes county for damages alleged to have accrued to plaintiffs by depriving their cattle of water during the month of August, 1911.

The plaintiffs alleged, in substance, that they leased the southeast quarter of section 4, township 32, range 51 west, in said county, for the purpose of pasturing their cattle thereon; that a stream of water, called Little Cotton Wood

creek, ran through a corner of said tract of land, and afforded a sufficient amount of running water to supply plaintiffs' cattle, but for the wrongful acts of the defendant; that defendant owned a tract of land through which the Little Cotton Wood creek ran adjoining plaintiffs' land, which was situated up the stream from the plaintiffs' pasture; that defendant had constructed a dam in the said creek, on his own land, and had used some water out of the stream for the purpose of irrigation; that, as soon as plaintiffs turned their cattle into the pasture above mentioned, the defendant notified them to take them away, and put a slushboard on his dam, opened the headgate to his irrigation ditch, and entirely stopped the flow of the stream through plaintiffs' pasture, thereby depriving their cattle of water; that they were compelled to, and did, put up a windmill and tank, and constructed a well for the purpose of watering their stock; that, before they could complete their improvement and provide water for their stock, their cattle suffered for the want thereof, and fell off in weight and condition, to their damage in the sum of $2,160, for which they prayed judgment.

The defendant, by his answer, alleged that he had a lease on the southeast quarter of section 4, township 32, range 51 west, and that plaintiffs were trespassers thereon. Defendant denied the allegations of the petition, and set up a claim of right to the water taken by him. Defendant made a counter-claim of $250 for damages to his crop of hay, alfalfa and corn by the plaintiffs' cattle, which he alleged had trespassed on his premises. The allegations of the answer were denied by a reply. The cause was tried to a jury, and a verdict was rendered for plaintiffs for the sum of $397.50. A motion for a new trial was overruled, judgment was rendered on the verdict, and the defendant has appealed.

The appellant, by his brief, has presented the following questions for the consideration of the court: First. Is the verdict supported by the evidence? Second. Did the court err in his instructions to the jury?

As to the first assignment of error, the evidence discloses that plaintiffs produced a lease of the premises in question from the owner thereof, duly executed, which was introduced in evidence. The defendant, on this question, failed to introduce any testimony showing, or tending to show, that he had any right to the possession of the land in question. The testimony shows, that, acting under their lease, the plaintiffs commenced to turn their stock into the pasture about the first days of August, 1911, and by the middle of August had placed about 309 head of cattle therein; that at the time they turned their cattle into the pasture there was a sufficient amount of water flowing through the creek to supply their stock. As soon as defendant discovered that plaintiffs had turned the stock into the pasture, he nailed a slushboard on his dam, opened up the headgate to his irrigation ditch, and entirely stopped the flow of water in the stream through the plaintiffs' pasture. It appears that, when the flow of water in the stream through the pasture stopped, one of the plaintiffs went up to the defendant's dam and examined the condition of it. He testified that the slushboard was on the dam and was banked up with dirt; that he examined the head of water at the headgate of the defendant's irrigation ditch, which he found was opened, and the depth of water running through the ditch at that time was at least eight inches; that the water flowed out into the defendant's meadow and away from the creek; that there was practically no water flowing down the creek below the defendant's dam; that there was a little seepage through the dam, which was scarcely enough to be noticed; that this condition continued from about the 12th day of August until the 2d day of September; that during the meantime plaintiffs' cattle were simply famishing for want of water; that they broke through the fences, and would go tearing all around the pasture trying to get out; that plaintiffs then started to put in a windmill to supply water for the cattle, but it took ten days before they could get it in operation. During that time the cattle occasionally broke through the fences, and plaintiffs had

to repair them; that they were obliged to keep a watch upon the cattle day and night; that after the water was restored they had no further trouble; that they expended in constructing the windmill at least $200; that they had plenty of water after the improvement was completed, which was on the 2d day of September. It appears from the testimony that the slushboard was pounded down on defendant's dam so tight that no water could go through, except just the natural seepage; that the water was all running through the headgate to his irrigation ditch; that at that time defendant's crop was all made, and he had nothing to irrigate.

As to the condition of plaintiffs' cattle, the testimony shows that they had shrunk in weight; that they were just milling around the pasture all the time; and that they shrank from 65 to 75 pounds a head. The testimony also shows that plaintiffs complained to the state board of irrigation that the defendant was depriving them of water for their stock; that Mr. Francis, an assistant to the state engineer, and Mr. Cripps, a man he sometimes employed to do the work for him when he could not do it himself, went to the defendant's dam and lifted the slushboard so as to let the water flow down the channel of the stream, and adjusted the defendant's headgate to his irrigation ditch; that plaintiffs again complained, and the assistant engineer again visited the defendant's dam and found the slushboard nailed down and banked up with dirt, and that all the water was going through defendant's irrigation ditch; that he again raised the slushboard and adjusted the headgate. The testimony shows that before defendant nailed down the slushboard on his dam there was a good steady flow of water down the stream, sufficient for domestic use, and to supply water for the use of plaintiffs' cattle. The testimony also shows that the defendant was seen frequently at his dam with a shovel on his back.

Mr. Francis testified, in substance, that he was superintendent of the district where the defendant's dam was situated; that he was at the headgate of the defendant's irrigation project; that the defendant had a dam in the

creek, and had a box running out into the pond above his dam; that there was very little water going through the dam; that he told the defendant that the water was needed for domestic purposes, and he must put up a headgate that the witness could regulate; that defendant had a dam to begin with, and on top of the dam he had a slushboard so as to raise it and turn the volume of water into his irrigation ditch; that witness pried off the slushboard, but that he could not shut the defendant's headgate, and he therefore filled it with dirt so that he could turn some water down the creek; that his assistant, Mr. Cripps, was with him the second time when he visited the defendant's dam. Several witnesses testified as to the condition of the plaintiffs' cattle, and placed the shrinkage as high as 70 pounds a head.

Without further discussion of the evidence, it is sufficient to say that plaintiffs' cattle were damaged by being deprived of water during the month of August to a large amount.

The defendant, by his evidence, failed to deny any of the material facts testified to by plaintiffs' witnesses, and introduced no evidence showing, or tending to show, any right on his part to maintain the slushboard on his dam, and thus turn the water into his irrigation ditch and deprive the plaintiffs of a sufficient amount of water to supply their stock. In fact, the defendant admitted that his crop was all made at the time, and he had no use for the water for irrigation purposes.

The plaintiffs admitted that their cattle had trespassed upon the defendant's premises, and damaged him to some extent. The testimony as to the amount of damages varied from $79, as testified to by disinterested witnesses, up to $250, according to the defendant's own testimony. The questions as to the amount of plaintiffs' damages and as to the defendant's counter-claim were properly submitted to the jury. It appears that plaintiffs' cattle fell off from 50 to 75 pounds a head, and that the market value of the cattle was from 4 to 5 cents a pound, and the damage for that item alone was about $800. Giving the defendant

the benefit of the total amount of his claim, which was $250, it cannot be said that the evidence did not sustain the verdict, or that the amount of the verdict was excessive.

It is contended that the court erred in giving certain instructions to the jury upon his own motion, to wit, Nos. 4, 5, and 7. Instructions numbered 4 and 5 the appellant discussed together in his brief. By instructions 4 and 5 the jury were told, in substance, that if the defendant wrongfully and purposely diverted the water from Little Cotton Wood creek to such an extent that plaintiffs' live stock were deprived of sufficient water for their maintenance, and if defendant diverted the water from said stream and refused or neglected to permit sufficient water to flow down the channel of the stream to water plaintiffs' stock, then he would be liable for any damages which might result by reason thereof. It is insisted that these instructions were clearly wrong. It is argued that plaintiffs were not the owners of the quarter section through which the stream flowed, and were owners of large tracts of adjoining land; that they pastured 309 head of cattle upon this land, and that all of the 309 head of cattle obtained water at the watering place on the 160-acre tract, and it is insisted that plaintiffs had a right to water not to exceed 8 or 9 head of cattle, because those were all the cattle which the 160 acres of pasture would support that season; that by the instructions the court set at naught the rights of the defendant, and granted to the plaintiffs a greater right than was warranted by the law of riparian rights.

As we view the record, that question was not involved in this controversy. The defendant, by his testimony, made no claim that, by allowing the water to flow down the stream to the plaintiffs' watering place, he would be deprived of the use of the water to any extent whatever. On the other hand, he testified that he had no use for the water, because the irrigation season had terminated. This being true, no riparian right was in any manner involved in this controversy. The testimony shows that, if the defendant had not wrongfully interfered with the flow of the stream,

there would have been a sufficient amount of water to supply all of the plaintiffs' stock, and therefore the court did not err in giving the instructions complained of.

By instruction No. 7 the jury were told, as a matter of law, that on and after the 9th day of August, 1911, the defendant had no valid lease of the quarter section of land in question, and was not entitled to the possession and control of the same as against the plaintiffs. It is contended that this instruction was erroneous, because there was a conflict in the evidence upon this question. As we view the record, there was no conflict which would require a different instruction. The plaintiffs had a lease, properly executed, for the land, and all that the defendant's testimony shows is that he had been given an agency to lease the land, and that he had not leased the land to any one.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

THOMAS HARRISON, APPELLEE, V. WILLIAM SHULTZ; CHARLES W. LEMONT ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 17,927.

APPEAL from the district court for Madison county. ANSON A. WELCH, JUDGE. *Affirmed.*

Mapes & Hazen, for appellants.

H. F. Barnhart and *Isaac Powers, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Madison county, setting aside and canceling a sheriff's deed to lots 4 and 5, in Riverside Park addition to the city

of Norfolk. The appellants have filed no brief. The appellee filed no cross-appeal. The case was submitted on the brief of appellee. The evidence contained in the bill of exceptions appears to be sufficient to support the findings and decree.

The judgment of the district court is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

PETER E. OLSON, APPELLANT, V. EDWARD T. FARNSWORTH, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,941.

1. **Appeal:** NEW TRIAL: DISCRETION OF COURT. An order of the district court setting aside a verdict and granting a new trial will not be reversed, unless the record shows an abuse of discretion on the part of the trial court.
2. **Attorney and Client:** COMPENSATION. Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation for a specified service will not be allowed to contract for greater compensation for such service while the service is being rendered.
3. **Accord and Satisfaction.** When there is in good faith a controversy between the parties as to the amount due upon settlement, and a compromise is agreed upon by which each party yields a substantial part of the amount to which he in good faith claims he was entitled, and payment is made accordingly, which is received as full settlement, it will amount to an accord and satisfaction.
4. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury upon conflicting evidence is conclusive, unless upon the whole record it appears to be clearly wrong.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

McKenzie & Cox and *Tinley, Mitchell & Pryor,* for appellant.

Smyth, Smith & Schall, contra.

BARNES, J.

This action was commenced in the district court for Douglas county to recover a balance alleged to be due to plaintiff from his former attorney in the division of a sum of money collected by the defendant on a judgment obtained against the Nebraska Telephone Company and the Omaha Electric Light & Power Company in favor of the plaintiff.

It was alleged by the plaintiff that he had a contract with the defendant to prosecute his case against the two companies above named for 35 per cent. of the amount recovered by him, and if he was defeated, then defendant should have nothing for his services; that defendant took 50 per cent. of the amount recovered by plaintiff. The plaintiff prayed for a judgment for $1,607.63.

The defendant admitted that, before he commenced plaintiff's action against the aforesaid companies, they entered into a contract by which he was to have 35 per cent. of the amount recovered, but alleged that, after the plaintiff's action was tried the first time in the district court for Douglas county, which trial resulted in verdicts and judgments against the plaintiff, it was agreed between them that, if defendant would loan plaintiff a sufficient amount of money to enable him to prosecute an appeal to the supreme court, and would perform the necessary legal services, and advance the expense for printing the briefs and other necessary expenses, defendant should have 50 per cent. of the amount recovered, and, if they were defeated, then the defendant should have nothing, and plaintiff should repay to him the amount of money loaned and advanced by him in prosecuting the action. Defendant further alleged that he recovered a judgment for plaintiff, and collected as payment thereof the sum of $10,717.50; that when they came to divide the money a dispute arose between them as to the amount defendant should retain for his services; that the dispute was settled, and plaintiff thereupon received and accepted from the defendant the sum of $5,358.75, and plaintiff gave the defendant a re-

ceipt for that amount in full settlement of their several claims.

Plaintiff, by his reply, denied the allegations of the answer, and upon the issues thus presented the cause was tried the first time to a jury, and the plaintiff had the verdict. A motion for a new trial was sustained, and on a second trial the jury disagreed. On the third trial the defendant had the verdict, on which a judgment was rendered in his favor, and the plaintiff has appealed.

Appellant's first contention is that the trial court erred and was guilty of an abuse of discretion in setting aside the verdict of the jury on the first trial of his cause, and it is argued that the evidence was amply sufficient to sustain the verdict in plaintiff's favor. The record, so far as it relates to this question, shows that the judge before whom the cause was tried the first time gave due consideration to the motion for a new trial, and in the exercise of a sound judicial discretion sustained it. It is a well-settled rule that the court has a large discretion in the matter of granting new trials, which will not be interfered with, unless it is clearly shown that some legal right of the party against whom the order for a new trial is made has been disregarded. *Sang v. Beers,* 20 Neb. 365; *Tingley v. Dolby,* 13 Neb. 371; *Bigler v. Baker,* 40 Neb. 325; *Hackney v. Raymond Bros. Clarke Co.,* 68 Neb. 624; *Weber v. Kirkendall,* 44 Neb. 766. As we view the record, plaintiff has failed to show that the court abused his discretion in sustaining the motion.

Plaintiff's second assignment of error is that the allegations in the defendant's answer were insufficient to constitute a defense to plaintiff's cause of action, and therefore the court erred on the third trial in overruling plaintiff's objection to the introduction of any evidence on behalf of the defendant. This assignment of error is argued at great length in the appellant's brief. It may be conceded that under ordinary circumstances an attorney will not be allowed to contract with his client for an increase of compensation for a specified service. The defendant's answer, however, contained a plea of accord and satisfac-

tion, and this was sufficient to require the trial court to overrule the objection, and, if the evidence was conflicting on that point, the court would be required to submit the cause to the jury.

The third and last assignment of error is that the evidence adduced by the defendant was insufficient, if true, to constitute any defense to plaintiff's cause of action, and the court erred in overruling plaintiff's motion for a directed verdict. The testimony discloses that, when the contract was first made between the parties, it was contemplated that a settlement of plaintiff's cause of action against the Telephone and Electric Light Companies would be made. No settlement was effected, and plaintiff's cause of action was twice tried in the district court for Douglas county. The first trial resulted adversely for the plaintiff. His motion for a new trial was overruled, and an appeal was taken to the supreme court, where the judgment was reversed. A second trial in the district court resulted in a verdict and judgment for the plaintiff, and on an appeal to the supreme court the judgment was affirmed. Thereafter the defendant collected the full amount of the judgment, with interest, amounting to $10,717.50. Afterwards, when the parties attempted to divide the proceeds of the litigation, they met at the United States National Bank, where the money was deposited, and the plaintiff claimed that under the terms of their contract he was to receive 65 per cent. of the whole amount collected. The defendant insisted that they had made a subsequent agreement; that after the plaintiff was defeated in the district court, and had informed the defendant that he had no money with which to continue the litigation, the defendant agreed to loan him the necessary funds, which plaintiff was to repay in any event, and defendant was to have 50 per cent. of the recovery. A dispute also arose between them as to the amount which should be paid to the physician who had treated the plaintiff for his injuries. Thereupon they went to the office of the physician, where the matter was adjusted, and plaintiff agreed that the defendant should pay the physician the sum of $100. This was

done, and the physician's receipt was taken therefor. They then returned to the bank, and after they had talked over the matter the defendant offered to pay the plaintiff one-half of the amount of the recovery, thereby waiving his right to the repayment of the money loaned to plaintiff, and also the amount that the plaintiff had authorized him to pay the physician. The amount the defendant tendered to the plaintiff was $5,358.75, or exactly 50 per cent. of the amount of money collected. It appears that the plaintiff accepted this amount, and gave the defendant the following receipt:

"Omaha, Neb. Jan. 14, 1911. Rec'd of E. T. Farnsworth the sum of fifty-three hundred fifty-eight 75/100 dollars in full proceeds of Olson v. Nebr. Tel. Co. P. E. Olson."

That thereupon the parties went to a restaurant, had their dinner, and afterwards walked some distance together upon the street, and, so far as the evidence discloses, they then parted in a friendly manner.

The plaintiff by his testimony denied that he ever entered into any agreement with the defendant by which defendant was to have 50 per cent. of the amount recovered in his case, but admitted that he was unable to provide the funds to carry on the litigation, and that defendant advanced the money to him for that purpose. He admitted, also, that when they came to divide the proceeds of the litigation a disagreement arose between them over the amount the defendant should retain, and also over amount to be paid to the physician. He testified, however, that defendant refused to pay him the money unless he would sign a receipt in full therefor, and that he signed the receipt without reading it; that he did not know what it contained, and that he never intended to accept the money paid him by the defendant as a full settlement. He made no explanation of why he did not read the receipt, except that it was poorly written and hard to read. He did not claim that he was not able to read writing, and his testimony on cross-examination disclosed that he well knew what the receipt contained.

The defendant, on the other hand, testified that he read the receipt in full to the plaintiff before the plaintiff signed it; that the plaintiff also read it, and after it was signed the defendant paid him the money; that nothing was said between them about withholding the money unless the plaintiff signed the receipt.

Upon this conflicting evidence, the cause was submitted to the jury, and a verdict was returned for the defendant. We are of opinion that the evidence sustains the verdict. The plaintiff at that time understood the situation fully, and was contending that the defendant proposed to withhold more of the proceeds of the litigation than he was entitled to. The defendant, on the other hand, was insisting that he was entitled, not only to 50 per cent. of the money collected, but should be reimbursed for the amount advanced to the plaintiff to enable him to carry on the litigation, and also for the amount which was paid by him to the physician. The result of that dispute was that defendant tendered to the plaintiff $5,358.75. The plaintiff took that amount, and gave his receipt therefor in full settlement. In this settlement the parties were dealing with each other at arm's length, and the transaction, if the jury believed the defendant, amounted to an accord and satisfaction.

The judgment of the district court is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

FUNKE ESTATE, APPELLEE, V. LAW UNION & CROWN INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 18, 1914. No. 17,950.

Insurance: CONSTRUCTION OF POLICY. Where an insurance policy contains inconsistent provisions, the courts, in case of loss, will adopt the provision which is most favorable to the assured and offers the protection which a fair interpretation of the policy will give him.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

C. C. Flansburg and *L. A. Flansburg,* for appellant.

C. Petrus Peterson, contra.

BARNES, J.

This was an action on an insurance policy, by which the Law Union & Crown Insurance Company of London, England, insured the Funke Estate for loss by fire of rents on its building situated on lots 1, 2 and 3, in block 56 of the city of Lincoln, to the amount of $3,000. The policy was attached to the plaintiff's petition, was made a part thereof, and was referred to as an exhibit.

It was alleged, among other things, that the defendant, for the sum of $45 paid by plaintiff as a premium, insured that plaintiff for the term of three years against loss of rents by fire, the defendant agreeing "that, in case the above named building, or any part thereof, shall be rendered untenantable by fire, this company shall be liable to the assured for the actual loss of rent ensuing therefrom, not exceeding the sum insured." The petition contained the following allegation: That plaintiff's loss by fire was $986.50, and of that loss the defendant is liable on its insurance policy for the sum of $246.62, for which sum, with an attorney's fee, the plaintiff prayed judgment. The petition contained all of the other averments necessary to recovery.

The defendant, by its answer, admitted that it issued its policy of insurance and delivered the same to plaintiff; that the policy was in writing, and was for the term of three years, from December 23, 1909, to December 23, 1912; and denied each and every other allegation contained in paragraph 3 of plaintiff's petition. Defendant alleged that the policy contained the express agreement that, in case of loss, the defendant should be liable only in the proportion that the sum insured under its policy should bear to the actual rental value of the premises at the time of the fire, but not exceeding, in any event, the sum of $3,000. It was

further alleged that the annual rentals arising out of plaintiff's building and premises for the 12 months immediately preceding the fire amounted to $25,584.92, and that other rental insurance was taken out by the defendant company in amounts as follows: In the Agricultural Insurance Company a policy for $2,500; in the North River Insurance Company a policy for $2,500; and in the National Union Fire Insurance Company a policy for $4,000, so that the total rental insurance on the 1st day of April, 1913, was the sum of $12,000, including the policy of the defendant.

Defendant admitted that, while the policy was in full force and effect, on the 1st day of April, 1912, the building so insured was damaged by fire, and parts of said building were rendered untenantable from the 1st day of April, 1912, to the 1st day of June, 1912, and that the amount of rentals under the leases on the rooms and portions of the building so rendered untenantable was in the aggregate sum of $986.50, and alleged that its policy limited the liability of the defendant company to the proportion that the sum of all of the insurance should bear to the actual rental value of the premises at the time of the fire, which was the sum of $115.67, which sum the defendant offered to pay the plaintiff.

The plaintiff demurred to the defendant's answer. The demurrer was sustained. The defendant refused to plead further, and judgment was rendered for the plaintiff for the sum of $246.62. The defendant has appealed.

It is contended that, by the terms of the policy, defendant is only liable to the plaintiff for the sum of $115.67 on account of the loss, while the plaintiff insists that the amount of the defendant's liability is $246.62, and, in our opinion, this question is fairly presented by the pleadings. The provisions of the policy, so far as they are material to this issue, are as follows:

"(1) Law Union & Crown Insurance Company, in consideration of the stipulations herein named, and of $45 premium, does insure the Funke Estate for a term of three years * * * against all direct loss or damage by fire,

except as hereinafter provided, to an amount not exceeding $3,000.

"(2) It is understood and agreed that, in case the above named building, or any part thereof, shall be rendered untenantable by fire, this company shall be liable to the assured for the actual loss in rent ensuing therefrom, not exceeding the sum insured.

"(3) Other concurrent insurance permitted.

"(4) It is understood and agreed that, in case of loss, this company shall only be liable in the proportion that the sum insured under this policy bears to the actual annual rental of the premises at the time of the fire.

"(5) This company shall not be liable under this policy for a greater *proportion of any loss* on the described property * * * than the amount hereby insured shall bear to the whole insurance * * * covering such property."

The first and fifth provisions appear in the printed part of the policy, and the second, third, and fourth in a typewritten slip attached thereto. It must be conceded that, if the defendant's liability is determined by the second and fifth provisions of the policy, the judgment of the district court is correct; but, if the liability is measured by the terms of subdivision four, the judgment must be reversed. The policy provides for other insurance, and it appears that at the time of the loss the total insurance on the building amounted to $12,000. By apportioning the loss between the companies according to the terms of the second and fifth subdivisions of the policy, the defendant would be required to pay three-twelfths of the $986.50. Two of the other companies would be required to pay five-twelfths, and the remaining company would pay four-twelfths of the total loss. If the defendant's contention is adopted, and the limitation contained in the printed povision of the policy prevails, defendant, instead of being liable for three-twelfths of the loss, would only be liable for such proportion thereof as the amount of its policy bears to the rental value, which defendant alleged

was $25,584.92, and the plaintiff would recover $130.95, less than the amount of his loss.

In 1 Phillips, Insurance (4th ed.) sec. 124, it is said: "The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy." "Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand in case of loss he is to be protected to the full extent which any fair interpretation will give." *Illinois Mutual Ins. Co. v. Hoffman,* 31 Ill. App. 295. See, also, *Sherman v. Madison Mutual Ins. Co.,* 39 Wis. 104. The provisions of subdivision two and subdivision four are inconsistent and cannot both be enforced. Where a policy contains two provisions on the same subject, and they are inconsistent and contradictory, that provision most favorable to the insured will be accepted, and the other disregarded. *Northwestern Mutual Life Ins. Co. v. Hazelett,* 105 Ind. 212; *First Nat. Bank v. Hartford Fire Ins. Co.,* 95 U. S. 673; *Illinois Mutual Ins. Co. v. Hoffman, supra; Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338; *Imperial Shale Brick Co. v. Jewett,* 169 N. Y. 143.

The construction placed upon the policy by the district court accords with the rule announced in the cases above cited. By the terms of the policy sued on, the plaintiff did not agree to carry any insurance in addition to this policy. The paragraph of the policy on which the defendant relies does not provide for other insurance. It does not fix a percentage of insurance to be carried. It does not contain an agreement on the part of the assured to be a coinsurer. It does not limit the liability of the defendant to any particular percentage or proportion of the loss, where the loss is less than the amount insured. By the judgment of the district court the plaintiff has total indemnity up to the sum insured, and, the loss being less than the amount of the insurance, plaintiff was entitled to full indemnity as prayed in its petition. This construc-

tion of the provisions of the policy is more favorable to the insured than the one suggested by the defendant.

It follows that the judgment of the district court was right, and is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

DANIEL BUCKLEY, APPELLEE, V. FRANK W. MAJOR ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 18,675.

1. **Intoxicating Liquors**: PETITION FOR LICENSE: NUMBER OF SIGNERS. A petition signed by 29 resident freeholders of a village which contains only 57 freeholders is sufficient to authorize the licensing board to publish the notice and grant a license, where no remonstrance or other objection is filed before the board prior to the hearing of the application.
2. ———: LICENSE: FORFEITURE. An applicant obtained a license without objection and prior to the filing of any remonstrance. He opened his saloon and sold intoxicating liquors until he received notice of the filing of a remonstrance. *Held*, That on the hearing of the remonstrance, he had not thereby forfeited his right to a license.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

John N. Dryden and *Homer M. Sullivan*, for appellants.

W. D. Oldham, contra.

BARNES, J.

Appeal from a judgment of the district court for Custer county affirming the findings and order of the village board of the village of Oconto in said county, granting to one Daniel Buckley a license to sell intoxicating liquors in said village during the license year of 1914.

It appears from the stipulation and the evidence that on the 11th day of April, 1914, Daniel Buckley filed his petition for a license with the village board, which, when filed, contained the names of 29 resident freeholders of said village; that notice of the filing of the petition was published the first time on the 16th day of April, 1914; that on the 30th day of April, at 1 o'clock P. M., the board met, and, there being no remonstrance or objections of any kind before the board, a license was granted to the applicant. It further appears by the stipulation, which we find in the record, that at 6:30 P. M. of said 30th day of April a remonstrance was filed with the village clerk; that the applicant, on the 1st day of May, under color of the license which had been issued to him, and not otherwise, operated his saloon in said village, and sold intoxicating liquors in the usual course of business during said day; that on the evening of May 1 notice was served on the board of an application to the district court for a writ of mandamus requiring it to cancel the applicant's license; that thereupon the applicant closed his saloon, and did not reopen it, or again sell intoxicating liquors, until after a decision of the district court affirming the subsequent action of the village board, by which applicant was granted a license. It also appears that on the 2d day of May, 1914, the former order granting the applicant a license was canceled, and the village board set the remonstrance down for hearing on the 7th day of May, 1914; that on that day one of the original petitioners withdrew his name from the petition, and the name of four other freeholders of the village were signed to the petition with the consent of the board. It further appears from the stipulation that there were only 57 resident freeholders in the village of Oconto. At the hearing the remonstrance was overruled and the applicant was granted a license, but it was ordered that it should not be delivered to him pending an appeal to the district court, of which the remonstrators gave notice.

An appeal was perfected, and it was contended on the hearing in the district court that the petition of the applicant did not contain the requisite number of freeholders

to entitle him to a license, and the board had no authority for publishing the notice of his application. It was also contended that on the 1st day of May, 1914, the applicant opened a saloon and operated the same during that day, and sold intoxicating liquors without having a license therefor, contrary to the provisions of chapter 40, Rev. St. 1913. An ordinance of the village was introduced in evidence, by which it was provided, in substance, that it shall be unlawful for any person to sell or give away any intoxicating liquors within the village without having first complied with the provisions of this ordinance. By section 2 it was provided that any person or persons desiring to sell vinous, spirituous or malt liquor at retail shall procure a petition signed by 30 *bona fide* resident freeholders of the village of Oconto, and shall give notice of the filing of said petition by publication as required by the law of the state of Nebraska, commonly known as the "Slocumb Law." He shall file his bond in the sum of $5,000, as required by the statutes of the state of Nebraska, and conditioned as therein provided.

It is admitted by the stipulation that the applicant's petition was signed by a majority of the resident freeholders of the village at the time the notice was published, and it is contended by the applicant that the petition was sufficient according to the provisions of section 3869, Rev. St. 1913, and conferred jurisdiction upon the board to publish the notice and grant the license. It is not contended, and the remonstrance does not allege, a failure in any other respect to comply with the ordinance of the village, and consequently that question need not be considered.

Section 3869, Rev. St. 1913, contains the following provisions: "In granting licenses or permits such corporate authorities in cities and villages, and the board of fire and police commissioners in such other cities, shall comply with and be governed by *all* the provisions in this chapter in regard to the granting of license. * * * Provided, further, in granting any license the petition therefor shall be sufficient if signed by 30 of the resident freeholders, *or if there are less than 60,* of a majority of the freehold-

ers of the ward or village where the sale of such liquors is to take place."

In the case at bar it appears that there were but 57 resident freeholders in the village, and that a majority thereof had signed the applicant's petition, therefore the ordinance which provided for the signature of 30 freeholders residing in the village was to that extent in conflict with the general statute above quoted. It follows that the petition was sufficient in the first instance, and authorized the village board to publish the notice and grant the applicant a license. *Thompson v. Mt. Vernon,* 11 Ohio St. 688. *Maxwell v. Reisdorf,* 90 Neb. 374, is not in conflict with this view, because in that case the petition was not signed by the required number of freeholders when the notice was published.

As above stated, on the day set for the hearing of the remonstrance in this case, one of the petitioners withdrew his name from the petition. This did not deprive the board of the power to publish the notice, for at the time the notice was published the petition contained a sufficient number of names of persons qualified to sign the same, and authorized the board to grant a license; and we are of opinion that, when one of the signers withdrew his name from the petition on the day set for hearing the remonstrance, the board had authority to allow the petitioner to substitute the four other resident freeholders as signers to his petition. *State v. Weber,* 20 Neb. 467; *Zielke v. State,* 42 Neb. 750; *Thompson v. Eagan,* 70 Neb. 170. It was not necessary to republish the notice of the application for a license to sell intoxicating liquors after the additional names were added to the petition.

This brings us to the determination of the contention of counsel that the applicant had been guilty of a violation of the Slocumb act, by selling intoxicating liquors during the year previous to the time he sought to procure a license. We think this contention is without merit. The applicant is conceded by the stipulation to be a man of good character and standing, and it is conceded that he had not previously engaged in the sale of intoxicating liq-

uors. On the 30th day of April the village board granted him a license, and, acting in good faith and under the belief that his license was valid, he opened his saloon on the 1st day of May, which was the first day of the current license year, and sold intoxicating liquors until the evening of that day, when he was notified of the filing of the remonstrance; that he immediately closed his place of business, and did not again engage in the sale of intoxicating liquors until the appeal of the remonstrators was decided by the district court for Custer county.

It seems clear that, if the applicant was guilty of a violation of law, that violation occurred within the current year, and to our minds it is extremely doubtful if he violated the law in any respect. He had complied with all of the provisions of the Slocumb law, and with all of the valid provisions of the ordinance of the village. At the time the license was granted to him on the 30th day of April, 1914, there was no remonstrance or other objections on file against the issuance of his license, and it would seem that the license first issued was in all respects valid. The fact that one of the signers to the petition withdrew his name some seven days afterwards would not be sufficient to make the applicant a violator of the law.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

ROSE and FAWCETT, JJ., not sitting.

STATE, EX REL. HENRY C. BITTENBENDER ET AL., APPELLANT, V. EXCISE BOARD OF CITY OF LINCOLN, APPELLEE.

FILED DECEMBER 18, 1914. No. 18,719.

Intoxicating Liquors: PROHIBITION OF SALE: REPEAL OF STATUTE. The act of the territorial legislature of 1855 (laws 1855, p. 158) prohibiting the manufacture and sale of intoxicating liquors was repealed by the legislative act of 1858 (laws 1858, p. 256).

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Henry C. Bittenbender and *Ada M. Bittenbender,* for appellant.

Fred C. Foster and *D. H. McClenahan, contra.*

BARNES, J.

An application was presented to the district court for Lancaster county for a peremptory writ of mandamus to compel the excise board of the city of Lincoln to adopt rules prohibiting the manufacture and sale of malt, spirituous and vinous liquors in said city, except for mechanical and medicinal purposes. An alternative writ was allowed, which contained, among other things, the allegation that the act of the territorial legislature of 1855 prohibiting the manufacture and sale of such liquors had never been repealed and was in full force and effect. The respondents demurred to the alternative writ, the demurrer was sustained, the action was dismissed, and the relators have brought the case here by an appeal.

It appears that the territorial legislature, at its session of 1855, passed an act (laws 1855, p. 158) to prevent the sale or manufacture of intoxicating liquors. By section 1 of that act it was provided: "That from and after the first day of April, A. D. one thousand eight hundred fifty-five, it shall not be lawful for any person to manufacture, or give away, sell, or in any way, or by any manner of subterfuge, traffic, trade, exchange, or otherwise dispose of any intoxicating liquors within this territory, to be used as a beverage." By section 2 it was provided: "The places commonly known as 'dram shops' are hereby prohibited and declared public nuisances, and their establishment shall be presumptive evidence of a sale of intoxicating liquor within the provisions of the foregoing section." Section 3 provided: "The establishment or the keeping of a place of any description whatever, and whether within or without a building, coming within the spirit and intent of this act, and the establishment, or the keeping a place of

any description where other persons are accustomed to resort, providing their own liquors, of the prohibitory character purchased elsewhere, and drinking same there, shall be taken to be within the meaning of this act." The remainder of the act provided suitable penalties for its violation.

It is the contention of the relators that this act, which was approved March 16, 1855, is still in full force, and therefore it is the duty of the excise board to provide rules for carrying the same into effect. It appears, however, that the territorial legislature, at its session of 1858, passed an act entitled "An act to license and regulate the sale of malt, spirituous and vinous liquors in the territory of Nebraska." Laws 1858, p. 256. We find from an examination of that act, which was approved November 4, 1858, that it is complete in itself; that it disposes of the whole subject relating to the sale of such liquors. It provides, in substance, that the county commissioners of any county in the territory may at any regular session grant and issue a license for the sale of malt, spirituous and vinous liquors to any person or persons who shall comply with its conditions. It provides that the applicant for a license shall file with the county clerk the petition of at least 10 freeholders of the township in which he resides, signed and attested before a justice of the peace or other competent officer, setting forth that the applicant for a license is a man of respectable character and standing, and a resident of this territory, and praying that a license may issue to him. It further provides that the applicant shall at the same time file with the county clerk his bond to the county in the sum of not less than $500 nor more than $5,000, with a good and sufficient security to be approved by the county commissioners, conditioned that during the continuance of his license he will not keep a disorderly house; that he will not allow gambling with cards, dice or any other implements or devices used in gambling within his house, or within any outhouse, yard or other premises under his control. It provides for the payment of all damages, fines and forfeitures which may be adjudged against

him under its provisions. It provides that the applicant shall pay into the county treasury for the use of the school fund to be distributed as other moneys a sum not less than $25 nor more than $500, at the discretion of the county commissioners, and shall file the treasurer's receipt therefor in duplicate with the county clerk before such license shall be issued; and suitable penalties are provided for selling without such license. The act further provides that any person or persons so licensed who shall sell any intoxicating liquor to an Indian, insane person, or idiot shall be fined, etc.; and that the person or persons so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; that he shall support all paupers, widows, and orphans, and shall be liable for the expense of all civil and criminal prosecutions growing out of or justly attributable to his *retail traffic in intoxicating drinks*; that it shall be lawful for any married woman or other person at her request to maintain an action on the bond above mentioned for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children; that, when any person shall become a county or city charge by reason of *intemperance,* a suit may be instituted by proper authorities on the bond of any person licensed under the act who may have been in the habit of selling or giving intoxicating liquor to the person so becoming a public charge.

Without further description of the provisions of the act, it may be said to contain a complete course of procedure relating to the sale of intoxicating liquors, and provides penalties for sales made without a license, and concludes as follows: "Section 16. All acts or parts of acts now in force coming in conflict with the provisions of this act are hereby repealed; except, 'An act to prevent the use of intoxicating liquors among the Indians or half-breeds in this territory,' approved January 26, 1856. Section 17. This act to take effect and be in force from and after its passage. Approved November 4, 1858."

It is a matter of common knowledge that the act of 1858 was immediately treated as a repeal of the prohibitory act of 1855, and from the date of its passage to the present time the municipal authorities, the legislature, the courts, and the people of the state have acquiesced in the licensed sale of intoxicating liquors. The act of 1858 has been several times amended, and the legislature of 1881 (laws 1881, ch. 61) adopted what is called the "Slocumb Law," which contains the provisions of the act of 1858, and the Slocumb act, as amended, is now chapter 40, Rev. St. 1913. That law, in effect, provides for local option, and thereby the sale of intoxicating liquors may be prohibited in any municipality where prohibition is desired by a majority of the people. This court has repeatedly construed the provisions of chapter 40, Rev. St. 1913, as authorizing the licensing and sale of intoxicating liquors as a beverage. *Barrett v. Rickard,* 85 Neb. 769; *Luther v. State,* 83 Neb. 455. This construction, after having been acquiesced in for more than 40 years, should be adhered to. *Franklin v. Kelley,* 2 Neb. 79.

Again, it is our opinion that the act of 1858 directly repealed the prohibitory act of 1855. Relators, in their able and exhaustive brief, conceded that all of the provisions of that act, except those contained in sections 1 and 2, were repealed, but insist that those sections are unrepealed and are in full force. We are unable to sustain this contention. The act of 1855 amounted to absolute prohibition, while the act of 1858 provided for the licensing and sale of intoxicating liquors. The last mentioned act was comprehensive in its terms, and disposed of the whole subject relating to the sale of intoxicating liquors. It in terms repealed all acts or parts of acts then in force in conflict with its provisions, except the act prohibiting the sale of intoxicating liquors to Indians and half-breeds. Every part of the act of 1855 was in direct conflict with the provisions of the act of 1858, and all of its provisions were repealed.

It may be observed that at the time this legislation was enacted the territorial legislature was not restricted

by any constitutional provisions relating to titles to acts, or to any particular form of repealing clauses.

It follows that the judgment of the district court was right, and it is

AFFIRMED.

ALVARADO W. CRAIG, ADMINISTRATOR, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILROAD COMPANY ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 17,877.

1. **Railroads:** GRADE CROSSINGS: CARE REQUIRED. At highway crossings at the same grade as the railroad, and at like street crossings in cities or villages, a railroad company must use such care and precaution as ordinary prudence indicates to avoid injury to travelers, and the degree of care which the law requires to be exercised must be commensurate with the probability of danger.
2. **Trial:** QUESTIONS OF LAW AND FACT. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to determine; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Brome & Brome, James B. Sheean and *George W. Peterson,* for appellants.

Sullivan & Rait and *W. T. Thompson, contra.*

LETTON, J.

Plaintiff's intestate was killed while driving over a railroad crossing in the village of Lyons. This action is for damages for the wrongful death of the deceased.

In substance, the petition alleges that there is a mill and elevator to the west of the railroad track in Lyons, Nebraska, near Main street; that a large number of teams

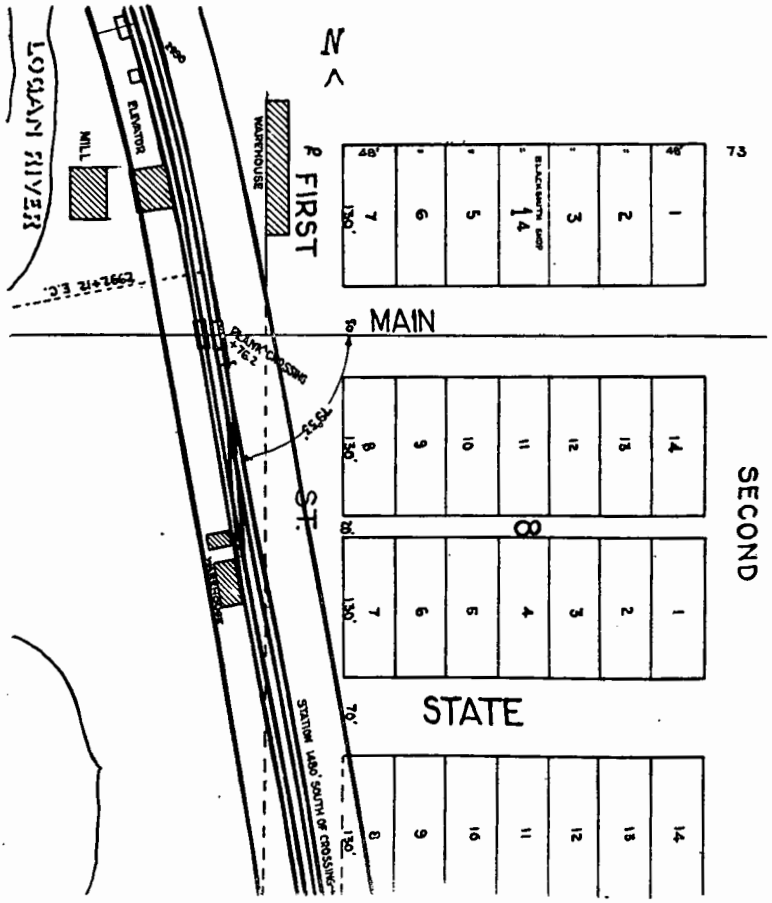
are constantly passing to and fro over the railroad crossing at that point; that on the 11th day of May, 1911, the plaintiff's son, Zell Craig, a young man about 18 years of age, and Catherine Craig, plaintiff's wife, while driving from the mill across the track, were struck and killed by a passenger train, of which defendant Murphy was the engineer; that the view was obstructed by buildings and erections close to the track, and there was no flagman stationed or signs given at the crossing. The negligence charged is that the defendant ran the train at a high, dangerous and unusual rate of speed, failure to ring a bell or blow the whistle when the train was at least 80 rods from the crossing, and to keep the same ringing or whistling until the crossing was passed, and the failure to stop the train after defendant railroad's servants knew that the team was upon the crossing.

The answer denies negligence, and pleads contributory negligence. It also pleads by way of counterclaim that, by the carelessness of the Craigs, the train was derailed and damages inflicted to the track, the cars and the engine in the sum of $1,015. A similar answer was filed by the engineer of the train, except that in his counter-claim he alleges personal injuries to himself caused by the derailment. Plaintiff had judgment against both defendants for $7,000, and defendants appeal.

The undisputed facts or those clearly proved will first be stated, and the testimony as to other material matters, narrated, omitting matter covered by the general statement.

Lyons is a village with a population of about 1,000 people. Main street, shown upon the accompanying plat, is the business street of the town, and the larger part of the business is transacted in the two blocks immediately east of the railroad crossing. The railroad station is 1,480 feet south of the crossing, and there is a slight upgrade from the crossing to the station. From 150 to 400 people cross the tracks at this crossing every day; a large number of them going to the mill, elevator and other buildings to the west of the track. A continuation of the street is also

the main highway to the well-settled farming country lying to the west of town. The mill and elevator are separated by a distance of from 20 to 23 feet, and this is narrowed by a platform on the side of the mill, used for load-



ing and unloading and for access to the building. Both the mill and elevator are operated by water power from the Logan river; the dam being close to the mill. There is a direct conflict in the testimony as to whether a box car was standing on the side-track near the south end of

the elevator, but the jury evidently found that the car was there and obstructed the view. From the center of the main line to the center of the side-track at the crossing is 14 feet, 10 inches. The ground slopes upward slightly from the driveway between the mill and elevator to the railway. Parties desiring to load or unload at the mill would drive north between the mill and elevator, but in order to return were compelled to drive beyond the mill and make a sharp turn, coming back through the driveway by which they entered. There is a sharp curve in the railroad north of the elevator, so that looking north from the mill platform, and from the turning place still further north, a view of the railroad can be had extending to the northwest for more than half a mile, and the view of the track from immediately west of the crossing is cut off by the elevator. There is a dam with an eight-foot fall close by the mill on the west, and this and the machinery of the mill made the locality of the driveway more or less noisy. On the morning of the accident Zell Craig, accompanied by his mother, Catherine Craig, drove to the mill with a grist, unloaded it upon the platform, drove north to the turn, and came back through the driveway. There was a strong wind blowing, but there is a conflict as to whether it was from the north or south. There is testimony that one of the horses that Craig was driving was a broncho which was not well broken, but this we think is not material, since there is no proof of fractious or unruly conduct on the part of this animal at this time. The estimates as to the speed of the train vary from 25 to 35 miles an hour, but we are satisfied from the proofs that it was running at least at the rate of 30 miles as it approached the crossing. The proof is that the statutory signals were given, and the court so instructed the jury.

The testimony on behalf of plaintiff as to other material facts is substantially as follows: One witness, who was in the blacksmith shop in the center of the block east of the crossing, on the north side of the street, said that he heard the train whistle for the crossing and afterwards

give a danger whistle before the team was struck, and that he did not see the team or wagon until after the collision.

The next witness was the plaintiff, who testified as to local surroundings, the age of his son, and his ability to labor. He also gave facts as to the other members of his family and the pecuniary loss sustained by the death. The third witness, who stood at the door of the blacksmith shop, testified that he saw the team come up over the railroad, and saw the wagon cut in two by the train; that at the time the team was being driven over the crossing it was "just coming over in a little trot."

On the part of the defendants, the miller, who helped Craig to unload the grist, testified that while he was on the mill platform, and after Craig had started the team north in order to turn, he heard the train coming south, whistle at the Logan bridge (which is half a mile north), and afterwards heard it whistle again for the crossing; that Craig turned and drove back between the mill and elevator with the team walking; that after he passed the mill, and just after he began to make the turn to the crossing, he used his whip on the horses, and continued to use it until he was struck by the engine. He also testified that there were no obstructions to the view north of the mill from the turn except a little clump of trees half way between the Logan bridge and the trestle bridge near the whistling post.

One Behn, who was driving a team for the mill-owner, was leaving the mill for the crossing just as Craig drove into the driveway. The witness drove his team to a point about 30 feet west of the side-track, when he heard the whistle and stopped. He waited for the train to pass. He testified that he saw Craig start to whip his horses as he turned to go up to the crossing; the horses were trotting; that he saw him look to the north as he went up the grade onto the crossing at about the switch track. The witness shouted as loudly as he could to him to stop as he passed him. Craig was then about 8 or 10 feet away from him. He did not see the train until it was east of the elevator.

Mr. Lyons, proprietor of the mill, was in the mill near an open window in the southeast corner. He testifies that he saw the team as it came south of the mill. As it approached the crossing Craig drove faster. He turned his head to the north as he cleared the side track, and as he turned back he applied the whip. He says, "the woman made a grab for his arm or the lines," and the horses passed onto the main line on a gallop. The team passed the engine, and it struck the wagon. There was no box car beside the elevator. Cross-examination: He first saw the train south of the elevator, and the whipping when Craig was going upon the switch track about 25 or 30 feet from the main line.

The engineer of the train testified that the bell was ringing continuously between the whistling post and the crossing; that he saw the team and wagon on the track when he was about 100 feet away and immediately applied the emergency air.

Another witness, the postmaster, who was 50 feet east and 60 or 70 feet south of the crossing, testified that he did not see the team until it was practically right upon the side track. Craig then was urging and whipping the horses and they were on a gallop.

The fireman testified that he rang the bell continuously from the whistling post until they reached the crossing, and that the train was going about 30 miles an hour.

Another witness was unloading garbage into the river southwest of the mill and about 100 feet west of the crossing. His attention was attracted by the manner in which Craig was driving past him toward the crossing; that he was whipping the horses and urging them on, driving right by the heads of the team of the witness. Witness heard the train when it whistled for the crossing, saw it through the driveway between the elevator and the mill, and saw it again as it came past the elevator. The Craigs were then just started to go across the track. He saw Craig look toward the train just as he was driving upon the track.

The city marshal was standing in the creamery building, which is situated a little more than 100 feet west of the railroad track, and south of the highway, a little farther west than the mill. He heard the train whistle, saw a team coming from the mill toward the crossing. The driver seemed to be hurrying his team to get across the railway track and the crossing ahead of the train. He heard the emergency whistle and heard the bell rung.

Four assignments of error are discussed in the appellants' brief. They are: (1) That the defendants were not guilty of negligence; (2) that the deceased was guilty of contributory negligence; (3) that the court erred in rejecting evidence in support of the counterclaim for damages; and (4) that the verdict is excessive.

Defendants claim that the evidence does not warrant the inference that the speed of the train exceeded 30 miles an hour at the time of the accident, and insist that, since the statutory warnings with bell and whistle were given, even though the actual speed was 35 miles an hour, as one witness testified, this alone is not evidence of negligence. It is also said that, since trains had been running at this rate of speed at that point for over 30 years, this was the customary and usual rate, and attention is called to the fact that there was no ordinance limiting or regulating the rate of speed within the corporate limits. It is insisted that a fast rate of speed cannot of itself be negligence, citing cases, and quoting the opinion of Judge Lake in *Burlington & M. R. R. Co. v. Wendt*, 12 Neb. 76, to the effect that "speed alone, unconnected with any other fact or circumstance, and more especially where it is not shown to have been unusual, has never, that we are aware of, been held sufficient to show gross negligence." This opinion, however, also states that a rate of speed entirely reasonable at some places and under some circumstances might evince a reckless disregard for the rights of persons and property at another. The latter principle is also stated by Judge Lake in his opinion in *Meyer v. Midland P. R. Co.*, 2 Neb. 319, 335. The Nebraska cases cited in support of the theory that the rate of speed is no evidence of negli-

gence show that in each case the facts were that the trains were running in the open country outside of the limits of any city or village, and the language used applies to such conditions.

Defendant railroad also contends that, since it complied with the terms of the statute with respect to sounding the whistle and ringing the bell, it must be held free from negligence. We cannot take this view. The fact that certain precautions have been deemed necessary at all public crossings is no indication that further precautions are not demanded by the exercise of ordinary care at other places where obstructions to the view or other circumstances render a crossing more dangerous. *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pa. St. 506, 21 Am. St. Rep. 914. The true principle is that a railroad company must use such care and precaution as ordinary prudence indicates. They must exercise greater care and greater vigilance in cities or towns where crossings are frequently used by large numbers of people than at ordinary crossings in the open country. The degree of care which the law requires to be exercised must be commensurate with the probability of danger. In some instances in cities and villages, ordinary care and prudence demand that gates be erected or flagmen stationed or electric bells or signals installed, while in other cases all that would be necessary would be to lessen the speed of the train, or give continuous signals of its approach, or both. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408.

The jury evidently found that the defendant railroad should have better safeguarded the crossing, or that the rate of speed, considered in connection with all the other circumstances, was a negligent one. We are satisfied that the latter conclusion is upheld by the evidence. There is no proof that the deceased knew of the customary rate of speed at which this train was run at that point, and, no matter how long the practice of so running the train over this dangerous crossing had existed, it would not justify the lack of ordinary care.

Defendant railroad next contends that the deceased was guilty of contributory negligence, and that consequently plaintiff has no right to recover. The question presented is whether, upon the undisputed evidence, it is clear that the deceased did not use ordinary care at the time and place, under all the circumstances. In this case we may start with the proposition settled and determined that the railway company was guilty of negligence in the operation of the train; but, as was said in *Chicago, B. & Q. R. Co. v. Schwanenfeldt,* 75 Neb. 80: "Individuals are required to have some regard for their own safety. Every person of mature years and in the possession of his faculties is bound to make a proper use of them to avoid danger, and we are all required to take notice of the fact that a railway crossing is a dangerous place, and he who makes use of it must exercise that degree of caution commensurate with the danger." See *Koester v. Chicago & N. W. R. Co.,* 106 Wis. 460. It is the settled rule in this court that, where upon the evidence different minds may draw different inferences or conclusions from the facts proved, or where there is a conflict in the evidence, the matter must be submitted to the jury to determine; but where there is no conflict, and but one reasonable inference can be drawn from the facts, the question is one for the court. *Guthrie v. Missouri P. R. Co.,* 51 Neb. 746, and cases cited; *Knapp v. Jones,* 50 Neb. 490.

We are of opinion that no unprejudiced mind can read the undisputed testimony without coming to the conclusion that the deceased heard the train coming, and that he rashly attempted to cross the track ahead of it. The fact that he was urging and whipping the team before he could see the train is of great importance as showing his knowledge that it was approaching. He must have seen the team driven by Behn which was waiting for the train to pass before it attempted to cross, even if he did not hear the shout. Laying aside all the testimony with reference to Craig's ability to have seen the train as he was passing north in the driveway or at the turn after the miller heard the whistle, we are fully convinced that, when he passed the witnesses to the south of the mill with his horses trot-

ting and continued to urge them forward, he must have known of the chance that he took, and that he took the chance with knowledge of the risk. It is said that the instinct of self-preservation would prevent such action on the part of the deceased, but experience teaches that the hot blood of youth will take risks that older men will shun. The law, however, draws no distinction, unless the reckless one is of such tender age that, by reason of his lack of knowledge and experience, he cannot be chargeable with the lack of ordinary prudence. The witness for the plaintiff who saw the team come upon the track stood at a distance of over 200 feet to the east and north of the crossing, while the other witnesses were within a few feet of the team when the driver was urging them to greater speed close to the danger point. Courts are reluctant to interfere with the verdict of a jury upon questions of fact; but, where the evidence is undisputed, it becomes their duty to apply the law, and, if it clearly appears that there is no cause of action, so to declare. The principles governing are so clear that it is useless to cite authorities upon these propositions, although scores of cases may be found. We are convinced that, if the deceased had used ordinary care, he would not have been struck by the train, and that he was guilty of such negligence that there is no cause of action.

Having reached this conclusion, it is unnecessary to consider the other assignments of error. The judgment of the district court is therefore

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. O. E. HEUER, TREASURER, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,893.

1. **Municipal Corporations:** POWER TO LEVY TAX. A village has no inherent power to levy taxes.
2. **Statutes:** CONSTRUCTION. In order to ascertain the intention of the legislature in the amendment of a statute, the course of legislation on the subject and existing conditions created under the former statutory provisions may be considered.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and *William M. Cornelius,* for appellant.

C. N. McElfresh and *Otto F. Walter, contra.*

LETTON, J.

Plaintiff applied for an injunction to prevent the county treasurer of Platte county from collecting for the year 1911 taxes based on a ten-mill levy by the village of Platte Center for a "water-works fund." It is alleged in the petition that the village taxing authorities, made other tax levies for the same year as follows: "For general fund purposes, ten mills on the dollar valuation; for sinking fund on village bonds, six mills on the dollar valuation; for interest on water bonds, two mills on the dollar valuation." Plaintiff also alleged that it paid the taxes based on these statutory levies, and that the ten-mill levy for a water-works fund is void for want of municipal power to make it. Defendant admitted the making of the levies, but pleaded: "That said levy of ten mills for 'water-works fund' was for the maintenance, repair and upkeep of the water-works system and plant used, owned and kept by said village; that the maximum levy for general purposes under the statute was insufficient for this expense, and

that said levy is in all respects valid." To this part of the answer the trial court overruled a demurrer. Plaintiff electing to stand on its petition, the trial court refused to enjoin the collection of the ten-mill levy for a water-works fund. Plaintiff has appealed.

Under the admitted facts, the question of law in dispute is: Had the village the power to make a ten-mill levy for a water-works fund "for the maintenance, repair and upkeep of the water-works system and plant used, owned and kept by said village," the maximum levy for general purposes being insufficient for that purpose? The answer, of course, must be found in the village charter.

Plaintiff takes the position that the village had no inherent power to levy taxes; that express power to make the levy assailed cannot be found in any statute; that the only express power conferred upon the village with reference to water-works was to levy a tax to pay bonds issued to provide for the plant and for the payment of interest on the bonds; that the village charter does not imply the power to levy the tax in controversy. The first proposition is sound. Municipal power to levy taxes is statutory. "It is a rule, requiring the citation of no authorities to support it, that a municipal corporation can levy taxes only for the purposes authorized by statute." *Barkley v. City of Lincoln,* 82 Neb. 181. *State v. Royse,* 71 Neb. 1; *State v. City of Kearney,* 49 Neb. 325; *State v. City of Wahoo,* 62 Neb. 40. But, while this is the general rule, another principle applies in certain cases, and power to levy a tax may be implied from express power given to incur an obligation where the legislature must have intended a tax to furnish means of payment, and there is nothing to rebut the implication. 4 Dillon, Municipal Corporations (5th ed.) sec. 1377. What was the legislative intention?

In 1885 (laws 1885, ch. 20, p. 168) the legislature provided that cities or villages may "levy and collect a general tax in the same manner as other municipal taxes may be levied and collected for the purchase of steam engines and for the purchase, erection, or construction and mainte-

nance of such water-works, or to pay for water furnished to such city or village under contract, to an amount not exceeding five mills on the dollar in any one year." This was in addition to the ten-mill levy for general revenue purposes. The amount was in 1887 (laws 1887, ch. 12, p. 297) increased to seven mills. In 1893 (laws 1893, ch. 8, p. 134) subdivision 15 was again amended, retaining the provision that cities or villages may borrow money or issue bonds for the purchase of steam engines or fire-extinguishing apparatus, and for the purchase, erection, construction and maintenance of water-works, or to pay for water furnished such city or village under contract; but the express provision for the levy of taxes only gave authority to levy and collect a tax "to an amount sufficient to pay the interest and principal of said bonds."

It is a matter of common knowledge and judicial history in this state that many municipalities and towns previous to this time had erected water-works, and others had entered into contracts to pay for water supply for municipal purposes. It could never have been the intention of the legislature to take away the power to levy an annual tax to pay for water supply under such contracts, or to repeal the existing right to raise money by taxation for maintenance of existing works. Construing the section as it now stands, together with section 5108, Rev. St. 1913, that gives the city authorities power to levy any other tax authorized by law, the only reasonable construction that can be given is that the legislature intended that the power to levy for such purposes should still be continued, but that the limitation of the levy to seven mills should be removed. This statute has remained in substantially the same form until now. If we should hold as the appellant desires, the effect would be to say that the legislature meant in 1893 to take away all power on the part of the city authorities to carry out their existing contracts. This it seems to us would be an unreasonable construction, and the implied power to levy the tax remains. The limits of this implied power are imposed by the reasonable necessities of the situation and by the reasonable discretion of

the city authorities. The power is not unlimited, and is subject to review if such discretion is abused.

Judgment

AFFIRMED.

CARLTON D. HUTCHINSON, ADMINISTRATOR, APPELLEE, V. WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT.

FILED DECEMBER 18, 1914. No. 17,902.

1. **Appeal:** EXCESSIVE VERDICT: REVERSAL. Where it is evident that, in fixing the amount of the verdict, the jury disregarded the instruction of the court as to the basis of recovery, and the verdict is so excessive that it must have been the result of passion or prejudice, the judgment will be reversed.
2. **Trial:** INSTRUCTIONS: STATEMENT OF ISSUES. Where a petition contains allegations of fact not supported by any evidence, it may be reversible error to include such statements in that part of the charge of the court defining the issues to be tried, and, if the reviewing court is satisfied that the jury has been misled by so doing, it will be its duty to grant a new trial.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Mahoney & Kennedy, M. F. Harrington and *H. G. Moorhead,* for appellant.

Crane & Boucher and *J. W. Woodrough, contra.*

LETTON, J.

Plaintiff is administrator of the estate of Charles B. Harris, deceased. The action is to recover damages to the next of kin by reason of the death of Harris while in the employment of defendant.

On the 25th of April, 1910, the deceased, with another workman, and a foreman were driving piles with an ordinary pile driver, operated by horse-power, on the premises of the Union Refining Company in Omaha. After a pile

had been driven it was necessary to move the pile driver to the place where the next pile was to be driven. When moving the machine it was customary to lower the hammer. At the time of the accident the hammer, together with another ponderous piece of iron, called the "follower," rested upon a piece of yellow pine scantling 2x4 inches in size, set on edge at a height of about 6 or 8 feet above the sills. This "toggle-bar," as it was called, rested upon the framework between the uprights or "leaders." The apparatus was large and top-heavy, and in moving it upon gas-pipe rollers under the sills it was necessary to use a crowbar as a lever at different points upon the sills to force or "pinch" it forward and in order to straighten its course. The span of the bar between the horizontal timbers on which it rested was about 17 or 18 inches. The hammer was about 16 inches wide, and the hammer and follower together weighed about 2,000 pounds. While moving the pile driver, Moore, the other workman, who was loosening one of the guy ropes and looking up at the rope, saw Harris pass close by him with a crowbar in his hand. In a moment afterwards he heard the breaking of the toggle-bar and the fall of the weight and saw Harris lying with his head under the hammer. He was instantly killed. The negligence alleged is the failure to supply a sufficient and adequate toggle-bar to hold up the weight; that the toggle-bar was of soft pine, weak and knotty, which, though it might hold up the weight while the machine was absolutely quiet, was, as the defendant knew, totally inadequate to sustain the weight during the process of moving the machine. The answer pleads contributory negligence and assumption of risk, and that Harris voluntarily placed himself in a position of obvious danger not within the scope of his employment. A verdict for $10,000 was returned by the jury, on which judgment was rendered.

The verdict is said to be so excessive that it must have been the result of passion or prejudice.

A few years before Harris had lived in North Dakota with his wife and three children, two sons and a daughter. The wife died. The family was kept together for a short

time with a housekeeper, but it separated in the autumn of 1909; the oldest son and the daughter going to live with an uncle in Wisconsin, and the father and younger son coming to Nebraska. In North Dakota Harris had been a tenant farmer, and between seasons had laid cement sidewalks. After coming to Nebraska he followed the same avocations for a time, but had worked for defendant with his team for over five months. The proof as to his earning capacity is not very clear. At the time of his death he owned a two-horse team, wagon and harness, and perhaps a little money; but it is shown that his work was irregular, that, though not a drunkard, he used liquor frequently, and it is not shown after he came to this state that he earned more than enough for his own maintenance, the keep of his team, and such sums as he was contributing to his children. At the time of his death Harris was 43 years old. Harry, the older son, was between 19 and 20; Homer, the younger son, over 18; and Dolly, his daughter, was 15 years of age. The older son testified that before leaving North Dakota he worked for his father; that he was strong and able-bodied, and that after he went to Wisconsin he was self-supporting, although he received money from his father a few times in small amounts. The second son testified that after he came to Nebraska his father did not furnish him any money; that he was and had been self-supporting, and that for the last two years he had been earning $60 a month. Harris paid $2.50 a week for the board of his daughter, and sent her in addition from $5 to $10 or $15 a month. It was the intention of both that, as soon as she was old enough to do so, she should keep house for her father. Considering the whole testimony, it may be doubted whether the sons suffered any pecuniary loss by the death of the father. Under these circumstances, considering the expectancy of the deceased, his earning capacity, the situation of his children, and the amount which he was able to contribute and did contribute to their support, it seems apparent that the jury disregarded the instruction of the court with respect to the measure of damages which limited recovery to pecuniary

loss, and that the verdict must have been the result of passion or prejudice.

Complaint is made of an instruction given with respect to expert evidence. We find no error in this instruction, which is widely different from that given in *Hayden v. Frederickson,* 59 Neb. 141.

Complaint is made of instruction No. 6. The jury were told that in order to recover the plaintiff must establish that the toggle-bar was of insufficient strength, and then proceeded: "Should the plaintiff so prove, and, *it not appearing that the deceased assumed the risk that caused his death or was guilty of contributory negligence,* plaintiff would be entitled to a verdict at your hands," etc. It is said that by this language "the court told the jury that neither contributory negligence nor assumption of risk appeared from the evidence." The phrase evidently means "and, if it does not appear," etc. We doubt whether this expression misled the jury, but it would avoid the possibility of misapprehension to change its form upon another trial. It is possible that jurors of foreign birth, unused to our idioms, might mistake the meaning.

The trial court was correct in holding that it was improper for the plaintiff, upon rebuttal, to attempt to prove that the toggle-bar was not sufficient and was not a usual and customary appliance. This should have been done upon the main case. As the case now stands, with the testimony upon this point, of a single witness who had comparatively little experience with pile drivers upon the one side, and that of a number of experienced bridge builders, some of them disinterested, upon the other, it is a close question whether the evidence supports the verdict. Upon a new trial the condition of the evidence in this respect may be different.

Complaint is made that the court did not properly state the issues. We are again moved to criticize the practice of copying the pleadings in full as a method of stating the issues to the jury. In this case the trial judge, in instruction No. 5 gave a clear, succinct and satisfactory statement of the issues as to negligence which the jury were

called upon to determine. The inclusion of the entire pleadings in the charge, which contained some allegations in the petition which were not supported by the evidence, may have operated to the substantial prejudice of defendant. Jurors are not lawyers, and are not always prepared to discriminate between that portion of a lengthy charge which contains statements made in pleadings, and the remainder of it. A clear, concise and terse statement of the issues is much to be preferred to the involved legal verbiage often found in formal pleadings, and is much more easily apprehended. Where a petition contains allegations of fact not supported by any evidence, it may be reversible error to include such statements in that part of the charge of the court defining the issues to be tried, and, if the reviewing court is satisfied that the jury has been misled by so doing, it will be its duty to grant a new trial.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

GEORGE BRAUN, APPELLANT, V. M. D. PEET, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,880.

1. **Appeal:** DISMISSAL: HARMLESS ERROR. The dismissal of a civil case for insufficiency of the evidence to sustain a verdict in favor of plaintiff, instead of giving a peremptory instruction for defendant, is not reversible error.
2. **Landlord and Tenant:** EVICTION: NOTICE TO VACATE. Mere notice to vacate leased land does not amount to an eviction of a tenant who disregarded it, remained in undisturbed possession several months, and voluntarily vacated the premises.
3. ———: ———: REPAIRS. The failure of a landlord to furnish materials for repairs according to the terms of his lease does not amount to an eviction, where the tenant has not been damaged by that breach of covenant.

4. **Appeal:** DISALLOWANCE OF NOMINAL DAMAGES. The disallowance of nominal damages to which plaintiff is entitled in an action for breach of contract is reversible error, where it affects a substantial right or prevents him from recovering costs; but the rule is otherwise, if he is not thus injured.

5. **Landlord and Tenant:** EVICTION: ACTION FOR DAMAGES: EVIDENCE. Evidence of the landlord's purpose to eject the tenant is immaterial in an action by the latter to recover damages for an eviction of which there is no proof.

APPEAL from the district court for Keya Paha county R. R. DICKSON, JUDGE. *Affirmed.*

Ross Amspoker and *Lear & Lear,* for appellant.

J. A. Douglas, contra.

ROSE, J.

This is an action to recover from defendant damages in the sum of $5,000 for evicting plaintiff from leased land and for violating provisions of the lease. For the term of five years from March 1, 1911, defendant leased to plaintiff, for a share of the profits, a ranch in Keya Paha county, and agreed to stock it and to furnish necessary materials for repairs. Plaintiff pleaded that defendant took away three head of cattle; that he failed to provide corn for feed; that he refused to furnish materials for repairs; and that he notified plaintiff November 14, 1911, to vacate the premises. Defendant denied eviction and liability for damages. The case was tried to a jury. At the close of plaintiff's testimony the trial court dismissed the action for insufficiency of the evidence to establish the cause of action pleaded, and discharged the jury. Plaintiff appeals.

The dismissal is challenged as erroneous because the proper practice, if plaintiff failed to prove his case, was to direct a verdict for defendant. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is not reversible error to dismiss the action, instead of giving a peremptory instruction for defendant. *Zittle v. Schlesin-*

ger, 46 Neb. 844; *Thompson v. Missouri P. R. Co.,* 51 Neb. 527.

It is argued that the case should have been submitted to the jury. The solution of this question depends on the sufficiency of the evidence. It is conceded that plaintiff was notified by defendant to vacate the demised premises November 14, 1911. In addition, there is proof tending to show that defendant took away three head of cattle and afterwards said he would "make it right;" that he refused to furnish materials for repairs; and that plaintiff expressed a purpose to surrender possession unless defendant would furnish corn for feed. Plaintiff, however, remained on the ranch until January 16, 1912. There was no attempt to evict him by legal process. While defendant had agreed to pay a portion of the cost of grain, if necessarily purchased for feed, the lease, when properly construed, did not obligate him to furnish it. On the facts proved, plaintiff voluntarily surrendered the demised premises. Under the circumstances of this case, the notice to quit, when considered with all other acts of the parties, did not amount to an eviction.

While there is evidence that defendant took three head of cattle away from the ranch, and that he violated his agreement to furnish materials for repairs, there is nothing to show the extent to which plaintiff was damaged in those respects. From the proofs, the jury could not have estimated any substantial damage to plaintiff, and the trial court properly refused to submit that question to them. It is nevertheless insisted, on the undisputed facts, that plaintiff was entitled to nominal damages for breach of the covenant to furnish materials for repairs, and that therefore the dismissal was erroneous. The failure to allow nominal damages is reversible error, where it affects a substantial right of plaintiff or prevents him from recovering costs. *Mollyneaux v. Wittenberg,* 39 Neb. 547. The rule, however, is otherwise where plaintiff is not thus injured. *School District v. Burress,* 2 Neb. (Unof.) 554; *Heater v. Pearce,* 59 Neb. 583. For the trial court's failure to allow plaintiff nominal damages, he is

not entitled to a reversal for the following reasons: Not having adduced evidence of actual damages, no substantial right of plaintiff was affected by the dismissal. On the merits of the case, a judgment for nominal damages was the full measure of plaintiff's right to a recovery. That relief would not have entitled plaintiff to costs, because it was grantable by a justice of the peace. *Rev. St.* 1913, sec. 8168 (Code, sec. 621); *City of Hastings v. Mills*, 50 Neb. 842.

Complaint is made because the trial court excluded offered evidence that defendant had a fixed purpose to evict plaintiff. Eviction was not shown, and proof of the abandoned purpose mentioned was properly excluded.

Rejection of evidence that defendant said he had no corn for feed and could get none is also assailed as erroneous. This assignment of error is based on a misinterpretation of the lease, and is without merit. Other assignments of a similar nature are also overruled.

Finding no reversible error in the record, the judgment is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

MARY BEBER, ADMINISTRATRIX, APPELLANT, V. BEEBE & RUNYAN FURNITURE COMPANY, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,881.

Appeal: DISMISSAL: EVIDENCE. Where the evidence is insufficient to sustain a verdict for plaintiff, the dismissal of the action is not erroneous.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

F. W. Fitch, for appellant.

Francis A. Brogan and *Anan Raymond, contra.*

ROSE, J.

For alleged negligence resulting in the death of Wyman Beber, his widow, as administratrix of his estate, brought this action against his employer to recover damages in the sum of $15,000. At the close of the testimony on behalf of plaintiff, the trial court sustained a motion to dismiss the action on the ground that the evidence was insufficient to sustain a verdict in her favor. From the judgment of dismissal, she has appealed.

Beber and a fellow-servant were engaged in moving dressers in a room in defendant's warehouse in Omaha, December 28, 1910. They sat on the floor, braced their feet against a cleat, and with their backs pushed four dressers piled one upon another; each being wrapped in excelsior and burlap and resting upon its back. While they were thus at work, the top dresser struck another pile, fell on Beber, and fatally injured him. The negligence imputed to defendant consisted in ordering Beber from his regular employment as a glass crater to the unfamiliar and dangerous task of moving dressers and in requiring him to perform his new duties without sufficient help. It is argued by plaintiff that negligence in these respects was the proximate cause of the injury.

Is there any evidence that the order amounted to negligence under all of the circumstances proved? While Beber was a glass crater, he had, when not thus engaged, frequently worked at different times for two months at moving dressers. He was familiar with that work in the room where he was injured, though he was not used to the actual pushing—an exertion within his strength, but not the proximate cause of his injury. Evidence that it was his duty, when not engaged at his regular employment, to be busy at something else is uncontradicted. When the order was given, he obeyed without complaint or protest. There was no latent or hidden danger. Beber was an employee of mature years and of ordinary intelligence. The dangers incident to the motion resulting from physical exertion of employees and to the ordinary operation of familiar laws

of gravitation were open and obvious. The order, under the uncontradicted proofs, was not given under circumstances requiring the master to warn the servant of the dangers mentioned. *Lewis v. Koller & Smith,* 186 Fed. 403. It is clear that there was no evidence of negligence in the giving of the order. It follows that the trial court did not err in refusing to submit this issue to the jury.

Is there evidence that the employee was required to engage in an unfamiliar and dangerous work without sufficient help? A pile contained from three to nine dressers and was generally moved by three men, one to steady it and two to push it. The pile being moved when the accident occurred contained four dressers. Beber and his fellow-servant were strong enough to move it, but plaintiff insists that the foreman went away without leaving any one to steady the pile, while it was being moved in the manner already described. In this connection it is also argued that Beber was required to go ahead with his work in the absence of the foreman. There is proof that the foreman went away temporarily without leaving any one to steady the pile, but there is no proof of actionable negligence in these respects. The instruction to keep busy was a general order previously given to all employees. There is no evidence that the foreman directed the work in hand to proceed in his absence. Beber knew from observation and personal experience the purpose of steadying a pile, while it was being moved. There is evidence tending to show that a broken, projecting leg of the dresser which fell on Beber caught on a pile he had just assisted in moving. He did not ask for more help or wait for the foreman's return. Knowing obvious conditions and dangers as well as his master he voluntarily proceeded with his work. Under familiar principles of law, these are circumstances under which a master is not chargeable with actionable negligence for failure to furnish more help for the work in hand.

The proofs do not show that the accident itself, when considered with all of the attending circumstances, neces-

sarily involves actionable negligence on part of defendant. The dismissal, therefore, was without error.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JOHN STEINER ET AL., APPELLANTS, V. FRANK STEINER, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,888.

Waters: SURFACE WATERS: RIGHT TO INCREASE FLOW. In the interest of good husbandry, the flow of surface waters along natural depressions or drainways through farm lands may be accelerated and incidentally increased by artificial means.

APPEAL from the district court for Butler county. GEORGE F. CORCORAN, JUDGE. *Affirmed.*

L. S. Hastings and *E. A. Coufal,* for appellants.

Matt Miller and *Cain & Mapes, contra.*

ROSE, J.

The relief sought is an injunction to prevent defendant from collecting surface waters in a drainage ditch on his own farm and discharging them upon the lands of plaintiffs. The suit was dismissed. Plaintiffs appeal.

Should a court of equity grant relief to plaintiffs under the evidence? This is the controlling question. The parties are adjoining proprietors, with a public highway between their possessions. Plaintiffs are the owners of the south half of section 27, township 16, range 2 east, in Butler county. Of section 34, directly south, defendant owns the east half of the northwest quarter. The natural course of drainage for both tracts is northward through the lands of plaintiffs. In the drainage basin through defendant's farm there is a winding ravine, which increases in width

toward the north, while its banks gradually decrease in height. In 1911 defendant constructed on his own land from north to south a drainage ditch 2,000 feet long, with the upper end in the ravine and the lower end at the highway. The relief sought, if granted, would require defendant to fill his ditch and to allow the surface waters to take their natural course. Plaintiffs assert that the ditch is constructed with an excessive fall of 27 feet; that defendant's artificial channel will collect and concentrate surface waters and discharge them with increased velocity upon the farm of plaintiffs; that there is no ravine on their lands below the north end of the drain; that the flood waters, when allowed to take their natural course, spread out and run slowly over the highway in a thin sheet 50 rods wide; and that the lands and crops of plaintiffs will be injured by the washing of the surface waters and by the depositing of silt, unless equitable relief is granted. The more convincing proofs, however, lead to the following findings and conclusions:

The ravine or natural drain widens and grows more shallow, forming a swale, as it approaches the highway. After heavy rains the water crosses the highway in a body, perhaps 20 or 30 rods wide. The lower end of the artificial channel is not far from the center of the natural drainage. Negligence in the construction of the ditch is not shown. The fall of the new drain was not excessive under the existing conditions. In a straight ditch it could not have been less. It was not much greater than the fall of the ravine for the same distance. The ditch was constructed in the interest of good husbandry. Both channels would be dry, except after heavy rains or melting snows, and would carry the same water from the same drainage basin to the lands of plaintiffs. At the time of the trial there had been no running water in the new channel. Since the construction of the ditch, a culvert has been placed across the highway.

Of course, the movement of surface water would be accelerated by the change from natural to artificial drainage, because the old channel was long and tortuous, while the

new is shorter and straight. A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor. *Todd v. York County,* 72 Neb. 207; *Perry v. Clark,* 89 Neb. 812; *Arthur v. Glover,* 82 Neb. 528; *Aldritt v. Fleischauer,* 74 Neb. 66. The quantity of water thus discharged upon the land of an adjoining proprietor may be increased. In the second case cited this court quoted with approval the following language of the supreme court of Iowa: "The owner of the dominant estate has the right, by ditches or drains, to drain his own land into the natural and usual channels which nature has provided, even though the quantity of water cast upon the servient estate may be somewhat increased." *Dorr v. Simmerson,* 127 Ia. 551. It is well established by precedent in other jurisdictions that the flow of surface waters along natural depressions or drainways may be accelerated and incidentally increased by artificial means. *Manteufel v. Wetzel,* 133 Wis. 619, 19 L. R. A. n. s. 167, and note; *Hughes v. Anderson,* 68 Ala. 280. The principles announced in the cases cited control the present controversy as disclosed by the facts already outlined. The findings and decree of the trial court are in harmony with these views.

It follows that the judgment is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

GEORGE J. STEWART, APPELLANT, V. OLIVER A. RIDENOUR, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,895.

Tax Deeds: VALIDITY: NOTICE TO REDEEM. A tax deed to land is void, if issued by the county treasurer under a sale made by him November 7, 1904, where the purchaser in his notice to redeem stated that the time for redemption would expire November 8,

1906, the statutory period in fact expiring November 7, 1906. Comp. St. 1903, ch. 77, art. I, sec. 214.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

Wilcox & Halligan, for appellant.

William E. Shuman, contra.

ROSE, J.

This is a suit to cancel a treasurer's deed to a tract of land in Lincoln county and to permit plaintiff as owner to redeem the land from the tax lien. November 7, 1904, was the date of the sale, and the treasurer's deed was dated November 8, 1906. The notice to redeem stated: The time for redemption will expire November 8, 1906, and if the premises are not redeemed from the tax sale on that day the purchaser will apply to the county treasurer for a tax deed. Plaintiff pleads, among other grounds for relief, that the tax deed is void for failure of the purchaser to comply with the statute in giving notice to redeem. The suit was dismissed, and plaintiff has appealed.

Was the notice fatally defective? The purchaser was bound by a statute requiring him, as a condition of being entitled to a tax deed, to give notice "when the time of redemption will expire." Comp. St. 1903, ch. 77, art. I, sec. 214. Under the constitution and the revenue law, that date was November 7, 1906. The date given in the purchaser's notice was November 8, 1906. Had the tax debtor, as directed by the notice, appeared on the latter date to redeem his land from the tax sale, he would have been one day too late, according to the limitation fixed by statute. The arbitrary terms of a revenue law, which prescribes in definite language the conditions under which a landowner may be divested of title, cannot be changed by construction to meet varying conditions or to conform to the promptings of equity. If a purchaser may extend for a day the period of redemption, why not for a year? A notice to redeem "must contain the precise information re-

quired by statute." *Thomsen v. Dickey,* 42 Neb. 314. Referring to the legislation under consideration, it was said in *State v. Gayhart,* 34 Neb. 192: "The provisions of section 123 of the revenue law relating to the time and manner of giving notice are mandatory, and must be substantially complied with, or the holder of the tax certificate will not be entitled to a treasurer's deed." In considering the same section, the following language was used in another case: "To entitle a party to a tax deed, all the essential requirements of the statute must be complied with, and if any are omitted the title will fail. 1 Cooley, Taxation (3d ed.) 323, 324. As the statute requires the notice to be given at least three months before the time for redemption expires to entitle the purchaser to a deed, there was no authority to give such notice and obtain a deed after the expiration of the time fixed by law to redeem." *Zahradnicek v. Selby,* 15 Neb. 579.

Courts in other jurisdictions hold that the purchaser at a tax sale, in giving the landowner notice to redeem, must comply literally with the statutory requirement to state "when the time of redemption will expire." In this respect the statutes of Nebraska and Illinois were the same. In both states the period of redemption expires in two years. In declaring a tax deed void under a sale June 1, 1885, because expiration of the period for redemption, as stated in the notice, was June 2, 1887, the supreme court of Illinois said: "The notice therefore did not correctly state the time of redemption, and hence was no compliance with the statute. This court has held in several cases that a misstatement in the notice of the expiration of the time of redemption will render invalid the tax deed." *Benefield v. Albert,* 132 Ill. 665. On this question the courts generally are in harmony. *Archer v. Tubbs Sheep Co.,* 25 S. Dak. 399; *Flickinger v. Cornwell,* 22 S. Dak. 382; *State Finance Co. v. Beck,* 15 N. Dak. 374; *Clary v. O'Shea,* 72 Minn. 105; *State v. Nord,* 73 Minn. 1; *Kipp v. Johnson,* 73 Minn. 34; *Kipp v. Robinson,* 75 Minn. 1.

The tax deed on which defendant relies being void, plaintiff should have been allowed to redeem. The judgment

of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

FRANK SAILLING, APPELLANT, V. CHARLES MORRELL ET AL., APPELLEES.

FILED DECEMBER 18, 1914. No. 17,913.

1. **Contracts**: BUILDING CONTRACT: BOND: LIABILITY OF SURETIES. A stipulation in a contract for the erection of a building, that the contractor will provide all of the materials and perform all the work, constitutes a promise by the contractor to satisfy the lawful claims of mechanics and laborers, and the sureties on his bond for the faithful performance of the contract are liable for a breach of such condition, and such bond inures to the benefit of a mechanic or laborer.
2. ———: BONDS: REFORMATION. Where a surety bond furnished by a contractor contains two inconsistent stipulations, the first of which renders the surety liable for the faithful performance by the contractor of all the conditions in the bond, and the second relieves such surety from liability therefor, the bond may be reformed in equity, when it is made to appear by pleading and proof that the second stipulation was inserted by fraud, or by mutual mistake or inadvertence.
3. **School Trustees**: BUILDING CONTRACT: LIABILITY OF TRUSTEES. Where school trustees, acting as a school board in letting a contract for the erection of a school building, act in good faith and require the contractor to give a bond which they deem sufficient to protect all parties interested, such trustees will not be held individually liable to one who performs work and labor upon such building under employment by the contractor, even though the bond be not conditioned in the exact terms of section 7117, Ann. St. 1911. In order to establish such individual liability, the burden is upon the plaintiff to plead and prove that the action of the trustees was wilfully wrong.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

H. D. Rhea, P. E. Horan and *Mahoney & Kennedy,* for appellant.

E. A. Cook and *J. V. Romigh, contra.*

FAWCETT, J.

This action was instituted in the district court for Dawson county, against the defendants individually, for work and labor performed by plaintiff in the erection of a school building in district No. 20, in that county, of which the defendants were trustees. The case was tried to the court without the intervention of a jury. From a judgment in favor of defendants, plaintiff appeals.

That plaintiff and his assignors performed the work and labor upon the school building, as charged, and that he has not been paid therefor, is admitted, and the only question for our decision is: Are the defendants, who were trustees of the school district, individually liable for the amount due plaintiff, by reason of the fact that a bond was not taken from the contractors, by whom the building was constructed, conditioned as required by section 7117, Ann. St. 1911, which provides:

"It shall be the duty of the board of public lands and buildings, boards of county commissioners, the contracting board of officers of all cities and villages, and all public boards now or hereafter empowered by law to enter into a contract for the erecting and finishing, or the repairing of any public building, bridge or other public structure to which the general provisions of the mechanic lien laws do not apply, and where mechanics and laborers have no lien to secure the payment of their wages, to take from the person or corporation to whom the contract is awarded a bond with at least two good and sufficient sureties conditioned for the payment of all laborers and mechanics for labor that shall be performed in the erecting, furnishing, or repairing of the building or in performing the contract; said bond shall be to the board awarding the contract; and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved

by said board. The said bond shall be safely kept by the board making the contract and may be sued on by any person entitled to the benefit of this act. The action shall be in the name of the party claiming the benefit of this act."

It is conceded that the school board did not take from the contractors a bond conditioned as provided in the section quoted, but it is alleged in the petition that the board did in fact require the contractors to furnish a bond, and there is attached to and made a part of the petition the contract entered into between the school board and the contractors, and the bond of the Fidelity & Deposit Company of Maryland, as surety for the contractors. The bond expressly provides that the contract entered into by and between the school board and the contractors "is incorporated herein, and made to form a part hereof." The contract provides: "The contractors shall and will provide all of the materials and perform all the work included in the general plans and specifications for the erection of a school building (giving dimensions and location of the school building to be erected), * * * all to be done in strict accordance and as shown on the plans, details and specifications prepared by the Black Hills Co., Architects, Deadwood, S. Dak., and identified as plan No. 507F, which is plainly marked on each sheet of the plans and details and on the front page of the specifications, and the same hereby becomes a part of this contract." By article 15 the contract provides: "The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained." It appears, therefore, that the contractors agreed to "provide all of the materials and perform all the work" included in the general plans and specifications for the erection of the school building. This agreement is incorporated in and made a part of the bond. The contractors failed to "perform all the work." By this failure on their part the surety company became liable to the school board to the extent of such failure, and the board has a perfect cause of action against the surety upon its bond.

The fact that the bond is not conditioned as specified in the statute above quoted, is immaterial. If the bond is so conditioned that it protects all persons who performed work and labor under the contract, plaintiff has suffered no loss by reason of the action of the board in taking a bond thus conditioned, instead of one conditioned in the terms of the statute.

In *Lyman v. City of Lincoln,* 38 Neb. 794, which involved the furnishing of material and labor in the erection of two engine houses, the contractors gave a bond to the city "to faithfully perform all the terms of the contract." It also provided: "The contractors shall file with the board of public works receipts of claims from all parties furnishing them with material and labor in the construction of such engine houses." Lyman sued the contractors and their sureties for lumber used in the construction of the buildings: *"Held,* (1) That the clause quoted above from the contract was a promise on the part of L. & S. (the contractors) to pay for all labor and material furnished them in constructing said engine houses; (2) that the statement of L. in his petition, that L. & S. owed him for lumber furnished to and used by them in said buildings, was a sufficient averment of a breach of said bond; (3) that the awarding of the contract by the city to L. & S. was a sufficient consideration to support their promise to pay for the labor and material furnished them in the performance of said contract; (4) that the promise they made to the city of Lincoln was for the benefit of all persons who furnished labor and material used in said contract, and such persons could sue on said bond; (5) that the existence of an express statute or ordinance of the city of Lincoln was not necessary to the authority of the city to require of L. & S. a bond to pay their materialmen and laborers." The trial court sustained a general demurrer filed by the sureties on the bond. This ruling was held to be erroneous.

Korsmeyer Plumbing & Heating Co. v. McClay, 43 Neb. 649, was an action on a bond for the erection of a county courthouse. It was stipulated in the contract "that in each case of payment a certificate shall be obtained by the

contractor from the clerk of the county that he has carefully examined the records and finds no liens or claims against said work or on account of said contractor. Neither shall there be any lawful claims against the contractor in any manner, from any source whatever, for work or material furnished on said work." The provision that there should not be "any lawful claims against the contractor in any manner, from any source whatever, for work or material furnished on said work," is no stronger than the agreement in the contract at bar which required the contractors to "provide all of the materials and perform all the work." We held the condition in the contract to be "a promise by the contractor to satisfy the lawful claims of laborers and materialmen, and that the sureties on his bond for the faithful performance of the contract are liable for a breach of such condition."

In *Fitzgerald v. McClay,* 47 Neb. 816, we held: "P. and S. entered into a contract with the state to erect for it a building at a stipulated sum. The contract required, *inter alia,* that the contractor should pay for all labor performed or material furnished, and a bond for the faithful performance of the contract was given. *Held,* That the sureties on such bond are liable to a subcontractor for materials furnished by him and used in the construction of the building." In the opinion by Norval, J. (p. 818), it is said: "The demurrer was, doubtless, sustained upon the ground that the bond was given alone to protect the state, and that third parties could not avail themselves of the stipulations; but since that decision was rendered this court has frequently held, in suits brought on bonds given for the faithful performance of a building contract similar to the one before us, that a person furnishing labor or materials for the principal in such bond may maintain an action upon the bond to recover the price of such labor or materials." Judge Norval cites a number of cases in support of his opinion.

In *Morton v. Harvey,* 57 Neb. 304, the contract was for the erection of a courthouse, and provided that the contractors were "to furnish all material and perform all the

labor." A bond was given for the due and faithful compliance with the obligations of the contract. In the syllabus we held: "A stipulation in a building contract *held* to embody a promise to satisfy true claims of laborers and parties who furnished material in the performance of the contract; also, that this promise of the contract was included in the obligations of the bond given to secure the fulfilment of said contract."

In *Des Moines Bridge & Iron Works v. Marxen & Rokahr,* 87 Neb. 684, we held: "A board of supervisors in contracting for the construction of a courthouse may lawfully require the contractor to pay for the material used in the erection of said building, and a bond executed to secure the faithful performance of that contract inures to the benefit of a materialman."

In harmony with these holdings is *City of Alpena v. Title Guaranty & Surety Co.,* 158 Mich. 678. We think it is clear from the authorities above cited that plaintiff is fully protected by the bond which the school board required of and received from the contractors. This being so, his remedy was a suit upon the bond against the contractors and their surety, and not against the individual members of the school board.

But it is insisted by plaintiff that he could not recover in an action upon this bond, for the reason that it contains this clause: "The surety shall not be liable under this bond to any one except the owner, but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and materialmen, arising out of the performance of the contract, and paid by him only when the same, by the statutes of the state where the contract is to be performed, are valid liens against his property." If the surety company, by reason of this stipulation in the bond, is relieved from liability to plaintiff, then it never incurred any liability whatever upon the bond. If it is not liable for the work performed by plaintiff, it could not be held liable for any default of the contractors, as nothing which any mechanics or laborers might do in the construction of the school building, from start to finish, would ever give them

a lien upon the school property, as the property is exempt by statute from any and all liens by mechanics, materialmen and laborers. If this clause in the contract is to be upheld in a case where the contract is for work upon public property, against which no lien can ever exist, then the entering into such a bond is a delusion and a snare. To so hold would be to permit a surety, with one hand to write into a bond a liability for all materials furnished and work performed in the construction of the building, and with the other hand to write in a clause exempting it from all such liability. It is too evident for serious thought to the contrary that the bond used in this case was the form of bond generally used for contractors under contracts for the construction or repair of buildings for individuals or private corporations, where, in case of a default on the part of the contractor to pay for the materials furnished and labor performed, a lien would attach. Such a clause has no place in a bond given for the faithful performance of a contract upon a public building. That it was not stricken out of the form of bond used in this instance may have been an oversight on the part of all parties concerned at the time the bond was executed. If so, it is subject to reformation.

Regardless of what we have above said, we do not think the defendants are liable individually, for the reason that it is neither pleaded nor proved that their action was wilfully wrong. On the contrary, the evidence clearly shows that defendants acted in good faith and required the giving of a bond which they evidently thought was sufficient to protect all parties interested. For an error of official judgment they are not individually liable. In *Reed v. Conway,* 20 Mo. 22, 43, it is said: "From a careful examination of authorities from the case of *Turner v. Sterling,* 23 Charles II, reported in 2 Ventris, 26, down to our own times, both in the English and American courts, the doctrine that a ministerial officer, acting in a matter before him with discretionary power, or acting in a matter before him judicially, or as a quasi judge, is not responsible to any one receiving an injury from such act, unless the offi-

cer act maliciously and wilfully wrong, is most clearly established and maintained." The nearest we have come to finding any such holding of liability against school trustees in a case like the one at bar is *Owen v. Hill*, 67 Mich. 43, in which two judges of the court were disposed to hold them liable while the chief justice and one other judge declined to so hold. The second paragraph of the syllabus in that case reads: "Whether such trustees are liable *in any event* for such neglect, query—SHERWOOD and CHAMPLIN, JJ., holding them so liable, and CAMPBELL, C. J., and MORSE, J., reserving their opinion on the subject."

Taking the case as a whole, we think it is clear that plaintiff has mistaken his remedy. The judgment of the district court is therefore affirmed, without prejudice to plaintiff's right to institute such other proceedings as he may elect.

AFFIRMED.

PARIS G. COOPER V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1914. No. 18,708.

1. **Criminal Law:** ERROR: REVIEW. Where the evidence in a criminal case tried in the county court is certified to the district court in the form of a bill of exceptions, which is used therein to maintain a petition in error filed in that court, this court, in a proceeding in error to review the judgment of the district court, will examine the entire proceeding, and affirm or reverse the judgment of the district court as the law demands.
2. **Municipal Corporations:** DISORDERLY HOUSES: LEGALITY. The maintenance of houses of prostitution may not lawfully be permitted in a city, although the purpose is to segregate immoral persons from the better class of citizens, for the protection of the latter from the force of evil example and dangerous associations.
3. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to sustain the judgment of the district court.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Justin E. Porter, William P. Rooney, Earl McDowell and *Allen G. Fisher,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

HAMER, J.

The plaintiff in error, hereafter called the defendant, seeks to review the judgment of the district court for Dawes county. He was tried before the county court under a complaint containing two counts. The first charged him with being the owner of a certain building within the county of Dawes, and with leasing said building to one W. H. Allen for the purpose of keeping therein a house of ill fame and a place for the practice of prostitution and lewdness. The second count charged him with owning and controlling a certain building in said county of Dawes, and unlawfully and knowingly permitting the same to be used by one W. H. Allen and divers other persons for the practice of prostitution and lewdness. There was a trial before the county judge on an amended complaint, which charged that the building specified in the original complaint was situate on lot C, in the town (now city) of Crawford, in said county, and that it was wrongfully and wilfully leased to John Doe and Jane Roe, whose true Christian names were unknown, and for the same purpose as that charged in the original complaint. The second count charged that the building was on lot C, in the town (now city) of Crawford, in said county, and that the defendant wrongfully, unlawfully, knowingly and wilfully permitted said building to be used by Pearl Darrah and Jane Roe for the purpose charged in the original complaint. Another defendant was charged with the defendant herein, but was not arrested. The trial was had on the 11th day of March, 1910, before the county judge, and the defendant was convicted on the first and second counts of the amended complaint, and sentenced to pay a fine of $50 on each count, together with the costs; and there was an objection to the bill of exceptions, but the bill was

finally settled and allowed and filed in the district court. The case was heard in that court, the judgment of the county court was affirmed, and the defendant has brought the case to this court on petition in error. The record contains the bill of exceptions allowed by the county judge and the bill of exceptions allowed by the district court, and the question presented is: Was the evidence sufficient to sustain the judgment.

While the evidence for the prosecution may not be quite as clear and as strong as could be desired in order to sustain the judgment of the county and district courts, it nevertheless sufficiently establishes a very peculiar and unusual condition of affairs. It shows that the defendant and others, of the city of Crawford, in Dawes county, associated themselves together with a view to segregating the immoral persons in said city who were engaged in the practice of prostitution and lewdness from the other residents of the city, and to that end there was built by certain persons, whose names do not very clearly appear in the proof, two houses in which there were to be maintained establishments for the practice of prostitution and lewdness. One Leona Bowdish testified to a residence in Crawford of six years, to knowing the defendant Cooper, and Mr. Hand, Mr. Bruer, the firm of Stanton & Son, and others connected with the unlawful enterprise. She was a stenographer employed in the office of Stanton & Son, and drew up a contract between the Stantons and Mr. Cooper for the construction of two houses on outlot C, at Crawford. The contracts were drawn in September or October, 1909, and were signed by John Bruer, P. G. Cooper, who is the defendant, Joe Hand and C. R. Ivins, also by Stanton & Son. The parties engaged gave her a blank contract and dictated what she should put into the blanks. She wrote in what was dictated to her, and put in the names as she was directed, and Mr. W. H. Allen testified that he rented the two houses; that he made a contract with Joe Hand. Joe Hand is shown by the evidence to have been the "manager." Hand was to collect the rent. Allen was to pay $100 a month for each house. Allen testified that

he paid for the furniture that went into the houses, and that he delivered possession of the houses to Pearl Darrah; that he sold the furniture to her, and assigned his lease to her. He claimed that the lease had been drawn in a lawyer's office in Crawford. He named the lawyer and a man named Winters. He said Winters was a partner with him at the start. He was unwilling to testify whether the name of the defendant, Cooper, was on the lease, but he thought it might have been; but he said Cooper was not in the capacity of running the houses. He testified that Joe Hand, whom he believed to be a policeman in Crawford, was supposed to be the owner.

The lawyer, who received the lease between Allen and Joe Hand, testified that the lease was at once destroyed, and that another lease was drawn up between Joe Hand and Pearl Darrah. A lease between Joe Hand, president of the Crawford Realty Company, and Pearl Darrah was introduced in evidence. The acknowledgment bore date December 23, 1909. It purported to be made between the Crawford Realty Company, by Joe Hand, its manager and president, and the said Pearl Darrah. This lease provided that the rent should be $200 for every month, payable in advance. Joe Hand appears to have paid by checks, $1,597.32, presumably toward the construction of the buildings. He also got a receipt from William Stanton & Son for $1,500. He also got a receipt for $25 from A. O. Antrim. Receipts are in the bill of exceptions for painting and plumbing and heating. There is also in the bill of exceptions a contract concerning the said premises as outlot C, in block No.—. The Pioneer Townsite Company signs this contract, by one B. M. Hewitt, its president. The contract purports to be given by the Pioneer Townsite Company to C. R. Ivins and P. G. Cooper, of Dawes county, and state of Nebraska. It is entitled "Surrendered Contract No. 12,274."

Joe Hand testified that he had some bills in his possession which related to the business "of the Crawford Realty Company, or this real estate." He testified that he had paid the bills; that he also paid the checks. At the sug-

gestion of counsel, he submitted the papers as evidence. He testified that the money was expended upon "the houses on outlot C, the property in controversy." Hand testified that he was street commissioner and police officer of the city of Crawford; that he collected from the tenants of the houses on outlot C any moneys by way of donations, so called, by order of any of the city officers; that he turned the money over to the city treasurer, and took the treasurer's receipt for it. Hand also testified that he had been connected with the enterprise all the time. He testified that he was "manager;" that he had ordered the stuff as manager, and paid the bills as manager; that the company included "whoever they would take on when they incorporated. Q. They have not incorporated yet? A. No, sir. Q. Who appointed you as night watch, or police commissioner? A. Why, the mayor and city council." He then testified that he commenced to collect from the inmates of these houses in December; that he collected $100 in December and $200 in January. He also testified that the contract price for building the houses was $2,500; that that was Mr. Stanton's bill. "Q. Now, you knew all the time you were making these collections that they (the houses) were occupied and used for purposes of prostitution? A. Certainly."

Where the judgment of a court of general jurisdiction is claimed not to be regular, the error alleged must be shown by an exhibition of the record. *Wright v. State,* 45 Neb. 44. This has not been done in this case. We are unable to say that the judgment is not sustained by the evidence.

The judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

OSCAR EISENTRAUT, APPELLEE, V. CHARLES MADDEN, APPELLANT.

FILED JANUARY 2, 1915. No. 17,738.

1. Instructions to a jury in a lawsuit should be confined to and be in accord with the evidence submitted upon the trial.
2. **Assault and Battery:** ACTION FOR DAMAGES: DEFENSE. The rule that when parties enter into a mutual combat, and the victim in good faith withdraws therefrom and is afterwards assaulted, he may recover damages for such assault, does not apply when one who is assaulted and severely beaten strikes his assailant immediately, in the heat of passion, upon escaping from his attack.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

Neal & Armstrong, F. L. Dinsmore, E. F. Warren and *E. B. Quackenbush,* for appellant.

S. P. Davidson and *Hugh LaMaster, contra.*

REESE, C. J.

This is an appeal from a judgment of the district court for Johnson county, wherein plaintiff, Eisentraut, recovered a judgment against defendant, Madden, for the sum of $1,500 on account of personal injuries alleged to have been inflicted upon plaintiff by defendant by unlawfully, and without cause, striking plaintiff upon the back part of the head with a large, heavy, metal scoop shovel, whereby a lasting and permanent injury was suffered by plaintiff, the character and extent of the alleged injuries being fully set out in the petition, together with plaintiff's pain and suffering, physically and mentally. The amount sued for was $10,000. The petition also contains a second cause of action, by which the expenses of the sickness and ailments, consisting of physicians' treatment and medicine, are alleged to the amount of $300, making a total of $10,300 damages alleged to have been suffered. Defendant an-

swered (1) by a general denial; (2) alleging that plaintiff first made an unlawful assault upon him, that he resisted the same only in self-defense, and that he used only such necessary force as was required from the assault and beatings inflicted upon him by plaintiff; (3) that, at the time mentioned in the petition, plaintiff, without lawful excuse or provocation, assaulted defendant, striking him, knocking him down, beating him when down, and inflicting a permanent injury to his right eye, by which the sight of his said eye was greatly and permanently impaired, and, in addition to his pain, suffering and mental anguish, he has been compelled to undergo treatment for his eye at heavy expense, and that he has thereby been damaged in the sum of $10,500, for which he asks judgment. Reply, a general denial. A jury trial was had, with the result above stated. Defendant appeals.

The evidence is conflicting in many respects, but, so far as the facts concerning the alleged assaults are concerned, there is practically an agreement. There was some difficulty between the parties, which seems to have been of a trivial nature. Plaintiff was a school district officer, but, upon the expiration of his term of office, was succeeded by defendant, who claimed there had been some slight irregularity in keeping the books of the office. Owing to some assertion by plaintiff as to his knowledge and ability to properly keep his accounts, defendant styled plaintiff as "Professor," which seemed to nettle him. At times harsher epithets were used by both parties, but this consisted of words only. On the 3d day of December, 1910, a neighbor was engaged in shelling corn, and these parties were called in to assist. Upon defendant's arrival at the place of the shelling, he passed near plaintiff, when he gave his apparently usual salute, "Hello, Professor." This angered plaintiff, who immediately ordered defendant to cease "calling him names." He approached defendant in a menacing manner, shaking his fists, and cursing violently, but to which defendant made little, if any, response, standing still, but holding his scoop shovel in such a position as to ward off any blows which plaintiff might attempt

to inflict. Plaintiff succeeded in breaking defendant's guard, striking him in the face, knocking him down, and immediately sprang upon him, beating him about the face, in the course of which assault defendant received an injury to his eye, which is claimed to be permanent. Defendant, being unable to protect himself, called to his son, who was near-by, to take plaintiff off, which he did. Up to this time plaintiff seems to have been the sole aggressor. Upon being taken off defendant, he started to walk away, probably with his side to defendant. Upon being released, defendant picked up his scoop shovel and struck plaintiff upon the head with the bowl or under side of the shovel, inflicting a small flesh wound, and which felled plaintiff to the ground. The alleged injury to plaintiff appears not so much to be the superficial wound itself as the effect of the blow upon the nervous system. The injury to defendant is alleged to be a rupture to the muscles and membranes of the eye, involving the retina and other parts of the inner eye, caused by the blow on the eye when defendant was knocked down, or thereafter while he was on his back receiving the blows inflicted by plaintiff. From the testimony of physicians and surgeons, as well as other witnesses, it would seem that both parties received more or less serious injuries, from which complete recovery is, to say the least, in doubt.

There is practically no conflict in the evidence as to the beginning of this unfortunate affair. While it was not in good taste for defendant to be derisively calling plaintiff "Professor," yet it did not charge him with the commission of any offense against the laws of the state, nor of the United States, nor did it accuse plaintiff of the violation of public morals, nor in any way slander him, nor hold him up to public contempt, ridicule or scorn. It was not intended as a pleasantry, perhaps, and yet could scarcely be considered so exasperating and defamatory as to excuse the assault which followed. The evidence shows that defendant committed no act which could be construed as a physical attack upon plaintiff, nor a desire to enter into a contest of that kind. Plaintiff was angry,

and approached defendant in a menacing manner, using language which could not be approved in polite society in any ordinary parlor conversation. Prior to the striking of the blow by plaintiff which felled defendant to the ground, defendant's actions were not aggressive, but rather indicated a desire to protect himself against the actual attack of plaintiff. Plaintiff could have withdrawn at any time before striking defendant, and the subsequent events would not have followed. He succeeded in striking defendant, knocking him down, when he sprang upon defendant and followed up the attack by striking and pounding him, until defendant, apparently becoming satisfied that, under the circumstances, he was no match for plaintiff, called for help, and plaintiff was, by force, removed. It may be assumed that defendant was not in the most pleasant frame of mind by that time, and not calculated to act with cool judgment and deliberation. Upon being released, he seized the shovel and dealt the blow of which plaintiff complains, felling plaintiff to the ground. Plaintiff arose, declaring in emphatic and forceful language, but not elegant, that he could whip defendant, but this seems to have closed the incident for the time being.

It is contended by plaintiff that he had abandoned his attack and was moving away when he received the blow complained of; but, if so, the distance to which he had gone is not clearly stated. However, it seems quite clear that he was not far enough away to have given defendant sufficient time to do much in the way of reflection. Otherwise stated, the blow with the shovel was not so long after the castigation received by defendant as to justify holding it to be a separate transaction and not a part of plaintiff's attack. Plaintiff was the aggressor. He committed an unlawful assault upon defendant, the final result of which was evidently not satisfactory to him. To use a common expression, he "got the worst of it." The question then arises: "Can plaintiff, after assaulting defendant, knocking him down, and inflicting an injury upon him, recover damages for what he has suffered and is suffering, which are the natural result of his own act?" We use the words

"natural result," not in the sense of a resulting or necessary effect of previous conditions, but those which might be looked for or expected, when considering the natural effect the treatment, or punishment, suffered by defendant would have upon an ordinary human being. Defendant was smarting under the injuries which he had received. Plaintiff, apparently satisfied with what he had done, claims that he turned to move away, when defendant continued the affray by striking plaintiff.

A kindred question arose in *Fosbinder v. Svitak,* 16 Neb. 499, where we held that a plaintiff could not recover where he had been the original assailant, the first wrongdoer, and, upon receiving injuries resulting from the affray brought on by himself, transfer his cause from the battlefield to the courts. A somewhat similar question was presented in *Taylor v. Clendening,* 4 Kan. 524, although not based upon exactly similar facts. In that case the plaintiff was held to be the aggressor, but his withdrawal from the affray was not as claimed in this case. The court say: "He cannot undertake to wreak an (un) lawful vengeance upon his antagonist—pistol in hand—and, defeated, sue him for damages to the person, upon the basis of the instructions. He must run his own risk. Nor would it be an easy matter for the party, attacked in the manner narrated in the testimony of the defendant, to act with all the deliberation the instruction would seem to require. In the heat of blood he could hardly be expected to weigh his words or to measure or count his blows or shots very carefully."

At the request of plaintiff, the court gave to the jury the following instruction: "The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat, or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his,

or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is any one justified in using more force than is reasonably necessary to get rid of his assailant. Now, if you believe from the evidence in this case that the defendant, Madden, voluntarily sought or invited the difficulty in which the plaintiff, Eisentraut, was injured, if you believe from the evidence that he was injured, or that the defendant provoked or commenced or brought it on by any wilful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for the defendant upon the ground of self-defense. In determining who provoked or commenced the difficulty or made the first assault, you should take into consideration all the facts and circumstances in evidence before you."

As we view it, much of this instruction cannot be applied to the evidence in this case. Assuming that the words, "Hello, Professor," can be construed as offering a direct insult, one that would, ordinarily, cause anger on the part of plaintiff, we are yet met with the well-established rule that mere words cannot justify an assault upon the person using them. There was therefore no legal excuse which could justify the attack of plaintiff upon defendant, which the evidence clearly shows he made. Without any just cause or excuse, he made such an attack, knocking defendant down. Plaintiff seems not to have been satisfied with the injury thus inflicted, but followed up the advantage thus gained by springing upon defendant and administering further beatings until defendant called for help, and plaintiff was forcibly pulled off the prostrate body of his victim. We find nothing in the evidence showing that defendant did "voluntarily seek or invite a combat, or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant." Nor can we apply the direction that "the right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his, or where

he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him."

The instruction also submits to the jury the proposition that, if defendant voluntarily sought or invited the difficulty, or if defendant provoked or commenced or brought it on by any wilful act of his own, or if he voluntarily or of his own free will engaged in it, the jury would not be authorized to find for defendant upon the ground of self-defense. There may be no question but that the instruction is sound law when applied to a state of facts coming within the rule, but, as we read the evidence, there was nothing therein to which the rule could be applied, and we are persuaded that the instruction, as written, should not have been given. From an examination of the instructions given on the court's own motion, it is clear that the law was fairly and fully presented to the jury, and all well within the issues in the case, and should have been sufficient.

Substantially, the same instruction was given and approved in *Morris v. Miller,* 83 Neb. 218, annotated in 20 L. R. A. n. s. 907; but there is a clear distinction between the two cases. In the *Morris* case the parties to the affray voluntarily and mutually agreed to enter into the contest, and both were wrongdoers. Therefore the instruction was properly given in that case. As we have shown, the facts in this case were quite different. The rule stated in *Glassey v. Dye,* 83 Neb. 615, is more clearly applicable to the facts of the case at bar than that of *Morris v. Miller, supra.*

While we recognize the established rule that, if a plaintiff wrongfully assaults a defendant, and, upon reflection, or for some other reason, voluntarily withdraws from the conflict, the person assaulted is not justified in following up the withdrawing party, and, after time for reflection, inflict a new and counter assault, and he may, in a proper case, be held liable for any damage arising from his wrongful assault; but that rule must be applied in reason and with a proper consideration for the passions and infirmities

of humanity. In this case the assault was committed by plaintiff with no legal justification or excuse. Had he voluntarily withdrawn from the contest after knocking defendant down, defendant might have been placed in the wrong, had he deliberately followed plaintiff, as he retreated, and renewed the contest by a counter assault; but that is not this case. After striking defendant and knocking him down, he sprang upon him, following it up by beating and pounding defendant, while down, until forcibly pulled off by others who came to defendant's relief. He was certainly willing to continue the punishment of defendant until forcibly compelled to desist. Defendant, while suffering and smarting from the injuries which he had received, arose from the ground, picked up his shovel, which was not necessarily a deadly or dangerous weapon, and gave the blow of which plaintiff complains. Plaintiff is entirely willing to forgive and forget the injuries inflicted upon defendant, but seeks to recover a money compensation for the injury he received in the affray which he inaugurated and followed up until compelled by force to desist, and which was immediately followed by what he received.

We are constrained to believe that the instruction above quoted should not have been allowed.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON and ROSE, JJ., not sitting.

SEDGWICK, J., concurring.

The majority opinion seems to hold that the evidence establishes that the blow of which this plaintiff complains was so connected with the affray which the plaintiff himself brought on that it must be regarded as a part of that affray. If this is the necessary conclusion from the evidence of course the judgment is wrong. I think that the instruction set out in the opinion was not applicable to the evidence, and was therefore erroneous. It was highly prejudicial to the defendant. For this reason I concur in the reversal of the judgment.

WALTER M. FINEGAN, APPELLEE, V. ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,911.

1. **Railroads:** CONSTRUCTION: CONTRACTOR'S BOND: LIABILITY TO SUBCONTRACTOR. Where a railroad company takes a bond from a contractor for the faithful performance of his contract for the construction of a part of its line of road in the state of Kansas, conditioned substantially as provided by section 7006 of the General Statutes of that state, it will not be liable to a subcontractor for the work of his teams and for profits claimed by him from such contractor.

2. ———: ———: ———: FAILURE TO FILE BOND: SUBCONTRACTOR: RIGHT OF ACTION. The fact that such bond was not filed with the register of deeds of the county where the work was to be performed will not entitle the subcontractor to maintain an action therefor against such railroad company.

3. ———: ———: ACTION: SERVICE ON CONTRACTOR: JURISDICTION. In such a case by the bringing of an action against the railroad company in a county in this state where the subcontractor resides, and serving a summons on the contractor in another county, no jurisdiction is acquired to proceed against the contractor.

4. ———: ———: ACTION BY CONTRACTOR: SUFFICIENCY OF EVIDENCE. Evidence examined, and found to be insufficient to sustain an action in favor of the subcontractor and against the railroad company.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

Brown & Eastin, Lathrop, Morrow, Fox & Moore, O. W. Pratt, E. A. Wunder and *John C. Hartigan,* for appellants.

F. N. Prout and *Heasty & Barnes, contra.*

BARNES, J.

Walter M. Finegan commenced this action in the district court for Jefferson county against Wood, Bancroft & Doty, to recover a balance alleged to be due him as a subcontractor under them in the construction of certain im-

provements on the line of the St. Joseph & Grand Island Railway Company in Marshall county, Kansas. He joined the railroad company as a defendant, for the alleged reason that the company, in letting the contract to Wood, Bancroft & Doty, failed to take the bond provided for by section 7006 of the General Statutes of Kansas for 1909. Service was had upon the railway company in Jefferson county, and thereupon a summons was sent to other counties, and was served upon Wood, Bancroft & Doty, at their office in Douglas county, and on George F. Bancroft at his residence in Butler county, in this state. The contractors challenged the jurisdiction of the court by demurrer, by their answer, and by objections to the evidence, and in every way reserved the jurisdictional question. The defendant railway company demurred to the plaintiff's petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the company answered over, alleging that Wood, Bancroft & Doty actually gave the company the bond provided for by the section above named. The company also pleaded the Kansas statute and the interpretation thereof by the supreme court of that state. The trial court, on motion of the plaintiff, struck out of the answer of the defendant railway company all of the allegations beginning with the plea of the law of Kansas, and the interpretations thereof by the supreme court of that state, for the reason that all that portion of the answer contained no allegations of fact, but were the conclusions of law of the pleader, and were immaterial, irrelevant and redundant.

The case then went to trial. The plaintiff offered, and the court received, in evidence the bond given by Wood, Bancroft & Doty to the defendant railway company; but the testimony showed that the bond was not filed with the register of deeds of Marshall county, Kansas. The plaintiff also offered, and the court received, the General Statutes of Kansas for 1909, and particularly section 7006, which is the section pleaded by both the plaintiff and the defendant company. The defendant further proved and offered in evidence exhibit 3, which was the subcontract

between Finegan, the plaintiff, and Wood, Bancroft & Doty, and then proceeded to introduce testimony tending to show the work he did under that contract.

The testimony of Finegan, commencing at page 11 and extending to page 42 of the bill of exceptions, relates with much detail the various efforts Finegan made to comply with his contract with Wood, Bancroft & Doty. All of this testimony was objected to by the defendant railway company, on the ground that it was not competent, and did not bind it for any work that the plaintiff did himself; that he had no lien, and no right to charge the defendant company for any work performed by himself; that the defendant company was not bound by anything contained in the contract between Wood, Bancroft & Doty and the plaintiff; that plaintiff could not fix a liability upon the defendant for any money due to him as a subcontractor from Wood, Bancroft & Doty. These objections were made to the court, and appear continually throughout the examination of the plaintiff's witnesses, but were overruled. The plaintiff's entire testimony simply tended to show that there was a balance due to him from Wood, Bancroft & Doty on his subcontract; while the testimony of the defendants Wood, Bancroft & Doty tended to show that there was nothing due plaintiff.

The defendant railway company, at the close of the testimony, requested the following instruction: "Under the pleadings and the evidence in this case, the jury will return a verdict for the defendant, the St. Joseph & Grand Island Railway Company." This instruction was refused, the cause was submitted to the jury, and a verdict was returned for the plaintiff and against both of the defendants for $1,240. Timely motions for new trials were filed by each of the defendants. The motions were overruled, judgment was rendered on the verdict, and defendants have prosecuted separate appeals.

It is the contention of the defendant railway company that the court erred in overruling its demurrer to plaintiff's petition, and that as against it the evidence failed to establish a cause of action in plaintiff's favor. It must

be observed that the plaintiff sought to recover against the railway company for the sole reason, as alleged in his petition, that it failed to take a bond from the contractors, Wood, Bancroft & Doty, as provided by section 7006 of the General Statutes of Kansas for 1909. That section reads as follows: "That whenever any railroad company shall contract with any person for the construction of its road or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics and materialmen, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the register of deeds in each county where the work of such contractor shall be. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

It appears from the testimony that the railway company did take a bond, conditioned for the faithful performance of the contract, from the contractors, which bond, together with a copy of the contract which was attached thereto, appears in the bill of exceptions. It was shown, however, that the bond was not filed with the register of deeds of Marshall county, Kansas, and it is contended by the plaintiff that this fixed the railroad company's liability in his favor. The question of the filing of the bond, however, was before the supreme court of Kansas in *Mann v. Burt,* 35 Kan. 10, and the court said: "On the part of the plaintiff, it is urged that before the railroad company will be exempt from liability for the debts of the contractor it must not only have taken a bond, but it must also have filed the same in the office of the register of deeds; while the claim of the company is that, to escape such liability, it was only required to take a good and sufficient bond; and this it alleges it had done. We agree with the de-

fendant. The statute is so written. Its terms are plain and unmistakable. The language fixing the liability of the railroad company is: 'And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor.' * * * Thus it will be seen that the filing of the bond is not a condition precedent to be performed by the railroad company before it can claim immunity from the payment of the debts mentioned in the statute. It is true that in a preceding part of the statute it is made the duty of the company to file the bond in a public office, and we might agree with the plaintiff that it would add much to the convenience of persons who desire to avail themselves of the benefit of the bond, to have required it to be filed before the company would be freed from liability; but when the legislature came to fix the condition upon which the liability of the company should arise, it provided that it should be liable if it failed to *take* a bond, and not if it failed to take and *file* the same; and the inconvenience occasioned, or the impolicy of the statute, are not considerations for the court."

It thus appears that the failure to file the bond created no liability to the plaintiff on the part of the railway company. It is contended by the railway company that the bond which was actually taken is sufficient in form and substance to comply with the statute, and we are inclined to the view that this contention is well founded.

It is further contended that the plaintiff, as a subcontractor under Wood, Bancroft & Doty, was not entitled to maintain an action on the bond against the defendant railway company. The statute of the state of Kansas, requiring a contractor to furnish a bond, has been construed many times by the supreme court of that state.

In *Wells & Co. v. Mehl,* 25 Kan. 205, the court said: "This may be a remedial statute, as counsel urges; but it is a statute imposing an additional liability, and under which it is sought to hold a party liable for a debt he never contracted. Such a statute should never be ex-

tended beyond the fair import of its terms." The statute in that case was held to be a *quasi* mechanics' lien law.

In *Missouri, K. & T. R. Co. v. Baker,* 14 Kan. 563, Judge Brewer, speaking for the court, said: "Baker sues for services rendered the contractor as 'time-keeper,' and 'superintendent.' Is such a debt one within the scope of the act? We think not. The act provides that the railroad company shall take from the contractor a 'bond, conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons,' etc., and, in case of failure to take such bond, that the company 'shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor.' * * * This act does not provide that the company shall be responsible for *all debts* contracted by the contractor, but only those to certain classes of persons. Now, the only class in which Baker can by any sort of construction be placed is described by the term 'laborers.'" The court then proceeded to hold that a time-keeper is not a laborer within the meaning of that term, and concluded as follows: "Counsel contends that this is a remedial statute, and should be liberally construed. But it is also a statute imposing an additional liability, and under which it is sought to make the company responsible for a debt it never contracted. Such a statute should never be extended beyond the fair import of its terms."

St. Louis, K. & A. R. Co. v. Cobb, 25 Kan. 388, was an action brought by persons who furnished a subcontractor with provisions and other goods for the subsistence of persons who worked in the construction of the railroad. In that case no bond was taken, and the court held that the question there presented had already been virtually answered in the negative, in the case of *Wells & Co. v. Mehl,* 25 Kan. 205. The court said: "The plaintiff in this case did not furnish anything to be *incorporated into the construction of the railroad itself,* which alone would place him in the first class; and he did not furnish anything *to the*

contractor, which we think is requisite to place him in the second class." It was held that the plaintiff in that case could not recover.

In *Atchison, T. & S. F. R. Co. v. Cuthbert,* 14 Kan. 212, where this statute was before the court, it was said: "Now, in this case a purely statutory liability is sought to be enforced. Independent of the statute, there is no law or reason for making the railroad company responsible for the debts of Oxelson & Riney. Hence, a party claiming under this statute must show all facts necessary to bring his case within its terms."

In *Parkinson & Co. v. Alexander,* 37 Kan. 110, it was held: "Laborers, mechanics and materialmen furnishing work or materials in the construction of a railroad are so protected that they may recover against * * * the railroad company where no bond is given, for everything furnished by them which goes into the construction of the railroad, whether such laborers, mechanics or materialmen are employed by the contractor, or by a subcontractor or by a sub-subcontractor; but persons furnishing only provisions, or goods which do not go into the construction of the railroad, are not so protected, unless such provisions or goods are furnished to the contractor himself."

In *Mann v. Burt,* 35 Kan. 10, it was held that the labor of teams is not protected, and where a man and his team were employed "for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable."

The supreme court of Kansas having thus interpreted the section of the statute in question, this court should follow such interpretation. The whole purport of the section is to protect laborers, mechanics and materialmen, and the words, "or to any person to whom any part of such work is given," should be read in connection with the words which immediately follow, "incurred in carrying on such work." These are the debts covered, and not the debt of an original contractor to a subcontractor. The plaintiff

himself testified on the trial as follows: "Q. Your bills that you contracted down at Carden are all paid, aren't they? A. I don't know that they are all paid. Q. Don't you know, as a matter of fact, they are all paid? A. I don't know that they are all paid, I know part of them is paid; yes, sir. Q. Well, aren't they all paid? You don't owe any teamsters anything down there, do you? A. No, sir; the laborers have all been paid. Q. The laborers have all been paid? A. Yes, sir. Q. The teamsters have all been paid? A. Yes, sir. Q. Your material bills have all been paid? A. Yes. Q. And the bills for your supplies have all been paid? A. Well, I don't know. Q. Don't you know that the very last vestige was settled in a lawsuit down in Marysville, when Wood, Bancroft & Doty paid it? A. I don't know that they have all been paid in full. Q. What did you say? A. I can't say that they are all paid, because I don't know. Q. Now, so far as you have heard, or learned, all these materialmen, or laborers, or supply men, none of them are calling on you now for any money? A. No. Q. Don't you know that they have all been paid? A. I don't know that they have all been paid, I never had no notice that they have all been paid. Q. Now, you did know that a few months ago a judgment was rendered down there? A. Yes, sir. Q. And paid by Wood, Bancroft & Doty? Do you know that Wood, Bancroft & Doty paid that judgment? A. They paid one judgment. Q. Now, you are not suing in this case in order to get money to pay any bills down there, or on behalf of any of these materialmen, supply men, or laborers and mechanics? (Objected to as immaterial, irrelevant, incompetent, and not the proper cross-examination. Sustained. Exceptions.)"

It appears from the evidence, without dispute, that Wood, Bancroft & Doty had taken up the work where the plaintiff left it, and finished it according to the contract with the railroad company; that they had paid all the claims of laborers, mechanics and materialmen, and all other claims of every kind and nature which had been made

against Finegan. Finegan only sought to recover against Wood, Bancroft & Doty for the labor performed by his teams and the profits which he claimed would have accrued to him had he completed his contract. It thus appears that no cause of action existed in favor of the plaintiff and against the railroad company, and the court erred in refusing to instruct the jury to return a verdict in its favor. It also follows that no cause of action existed in favor of the plaintiff and against the railroad company when the suit was brought, and that the defendant railroad company was joined as a defendant with Wood, Bancroft & Doty in order to obtain service upon that firm in Jefferson county, and the court had no jurisdiction to proceed against Wood, Bancroft & Doty. The judgment as to them must also be reversed.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, J., dissenting.

The conditions in the bond taken by the railroad company vary widely from those required by the Kansas statute, and it therefore failed to comply with that statute. By the provisions of the statute, if the company fails to take the statutory bond, it becomes liable to pay "all just debts due to such persons or to any person to whom any part of such work is given." While this language is not entirely clear, it is difficult to see what meaning can be given to it unless it means debts due from the contractor to a subcontractor. It is a common expression to say that work "is given" to a contractor or to a subcontractor.

We have been cited to no Kansas case which has construed this language, or which holds that liability to a subcontractor is not included by this statute. The most reasonable view is, it seems to me, that the intention was to include subcontractors.

ROSE and SEDGWICK, JJ., concur in this dissent.

ISAAC F. DOUGLASS, APPELLANT, V. CHARLES BURTON ET AL., APPELLEES.

FILED JANUARY 2, 1915. No. 17,947.

1. **Bills and Notes:** DEFENSES. When a negotiable note is purchased after maturity from an innocent holder who purchased it before maturity for value, the purchaser takes it free from all equities and defenses that existed between the original parties to the paper.
2. ———: ———: DIRECTING VERDICT. In a suit on such a note, it is proper for the trial court to direct a verdict in favor of the plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that plaintiff purchased it for value from an innocent holder, who obtained it by purchase for full value before its maturity.

APPEAL from the district court for Hitchcock county: HARRY S. DUNGAN, JUDGE. *Reversed.*

Lambe & Butler and *J. W. Cole,* for appellant.

W. S. Morlan and *C. H. Boyle, contra.*

BARNES, J.

This was an action in the district court for Hitchcock county on a negotiable promissory note, executed and delivered to Robert Burgess & Son by the defendants, on February 7, 1905, due 18 months after date, for $875, bearing interest at the rate of 8 per cent. per annum.

The amended petition was in the usual form, and alleged, among other things, that before the maturity of the note Robert Burgess & Son sold it to Frank N. Ireland & Son (bankers), in due course of business, for the amount due thereon with interest, at a discount of 2 per cent., and that payees indorsed the note as follows: "For value received, I hereby guarantee payment of the within note and waive demand and notice of protest on same when due. Robert Burgess & Son." That afterwards, on April 20, 1911, at Washburn, Woodford county, Illinois, for and

in consideration of $700 paid by plaintiff to said Ireland & Son, said Ireland & Son sold and assigned the note to the plaintiff and indorsed it as follows: "Pay to I. F. Douglass or order. Frank N. Ireland & Son." That plaintiff is the owner and holder of the note, that the same is long past due and wholly unpaid, and there is now due from defendants jointly and severally to plaintiff the sum of $875, with interest at the rate of 8 per cent. per annum, for which the plaintiff prayed judgment.

The defendants, by their answer, admitted that they signed the note as set forth in plaintiff's petition. Denied all of the allegations of the petition not specifically admitted, and alleged a complete defense as against the original payee.

Plaintiff, by his reply, denied the matters of affirmative defense set forth in the answer, and alleged that Frank N. Ireland & Son purchased said note of Robert Burgess & Son a long time before maturity, for full face value, less 2 per cent., and that, at the time of the purchase and sale of said note and delivery of the same and the payment therefor, said Frank N. Ireland & Son had no notice or knowledge of any defense thereto, and that Ireland & Son afterwards sold, assigned and delivered the note to the plaintiff.

The cause was tried to a jury, and a verdict was returned for the defendants. Judgment was rendered on the verdict, and the plaintiff has appealed.

Appellant contends that the verdict is not supported by and is contrary to the evidence. The note was introduced in evidence, and bore the alleged indorsements. Plaintiff introduced the deposition of Frank N. Ireland, who testified, in substance, that on March 7, 1906, at his office in Washburn, Illinois, he bought the note in suit for its face value, and interest, less 2 per cent.; that the money was paid to Robert Burgess & Son, the business being transacted with Charles H. Burgess; that he paid the consideration for the note by a check on the Washburn bank on March 31, 1906, and the note was then delivered to him; that the check was afterwards paid by the bank to

Robert Burgess & Son; that the indorsement was placed on the back of the note and signed by the bookkeeper of Robert Burgess & Son in his presence. Ireland further testified that he kept the note until April 20, 1911, when he sold it to the plaintiff, who paid him at that time the principal and interest to that date, and the indorsement, "Pay to I. F. Douglass or order. Frank N. Ireland & Son," was put on the back of the note by him at the time of the sale to Mr. Douglass; that the note was delivered to plaintiff at that time, since which time the witness Ireland had not had possession of it or any control over it, and that he claimed no interest in it whatsoever. He further testified that when he bought the note from Robert Burgess & Son he had no knowledge of any defense, or that it was claimed that there was a failure of consideration, and that he did not know what the note had been given for. His testimony was corroborated by the evidence of Charles H. Burgess, a member of the firm of Robert Burgess & Son, who also testified that Mr. Ireland was not told what the note was given for, and that Robert Burgess & Son, since the transaction of March 31, 1906, had no interest in said note. The plaintiff testified that he purchased the note in suit of Frank N. Ireland & Son on April 20, 1911, paying therefor the principal and interest due to that time; that the indorsement of Frank N. Ireland & Son was placed thereon at that time in his presence. On cross-examination plaintiff testified, in substance, as follows: The reason I bought the note, I was dickering with Mr. Ireland for several other papers at the same time, and I wanted this piece, and he told me if I bought it at his price he would sell me some other paper at the same time at my price. I had been in Nebraska previous to that time to look at some real estate, and had ascertained the financial responsibility of the parties who signed the note. In the fall of 1910 I investigated the value of some land on which Mr. Ireland was offering to sell me some mortgages, and Mr. Ireland told me to make inquiry as to the ability of the maker of the note to pay it. I inquired generally about McCook, Culbertson and Imperial. The information I

obtained at each place was substantially the same; the makers of the note were good for their contract, and well able to pay the amount due thereon, and their father had considerable property independent of what they had. I never heard of any defense to the note until after I brought this action. None of this testimony was disputed, and there was no evidence introduced impeaching or tending to impeach the testimony of plaintiff or any of his witnesses.

The testimony given by Charles Burton was permitted to go to the jury over plaintiff's objections, and tended to show a defense in the hands of the original payee, and that in June, 1907, Mr. Ireland came out to see the defendant about the note, and the witness told him: "I would not pay the note, and he wanted to know why, and I said I did not have value received, and he wanted to know why it was, and I said the horse had never got a colt, and I showed him my books, and he said, 'If that is the case and I had knowed it, I never would have come here to collect this note or tried to collect it.' * * * He said, * * * 'I will take this note back and turn it back to Burgess & Son,'" The witness further testified that he got notice from Mr. Ireland about the time the note was due which he did not answer; that Mr. Ireland came to see him after the note was due.

At the conclusion of the evidence, the plaintiff moved to strike out defendants' testimony as incompetent, immaterial and irrelevant, and because the testimony did not tend to prove or disprove any of the issues in the case. Plaintiff also moved the court to direct a verdict in his favor. The motions were overruled, to which the plaintiff excepted.

It clearly appears from the evidence that, when the note in suit was sold by Robert Burgess & Son to Ireland & Son, they purchased it for full consideration before maturity in good faith, and in the usual course of business, without notice of any defense thereto, and without any information as to the original consideration for which it was given; that it was sold to the plaintiff after its ma-

turity for its face value. The plaintiff therefore took the note free from all equities and defenses existing between the original parties to the paper. *Koehler v. Dodge,* 31 Neb. 328; *Barker v. Lichtenberger,* 41 Neb. 751; *Jones v. Wiesen,* 50 Neb. 243; *Knight v. Finney,* 59 Neb. 274; *Commissioners of Marion County v. Clark,* 94 U. S. 278.

We find nothing in the negotiable instruments law which in any manner conflicts with the rule stated in the cases above cited. Defendants contended, however, that, while the testimony of plaintiff's witnesses was undisputed and unimpeached, the jury were justified in returning a verdict on inferences to be derived from the evidence; that the jury were not required to accept the evidence introduced by plaintiff as true, though it was not directly contradicted. In support of this contention, defendants seem to rely upon *Ostenberg v. Kavka,* 95 Neb. 314. In that case the plaintiff did not allege that he purchased the note sued on in good faith, and the facts brought out by the testimony are different from those shown in the case at bar. In *Piper v. Neylon,* 93 Neb. 51, it was said: "In a suit on an unpaid, past-due negotiable promissory note, it is the duty of the trial court to direct a verdict in favor of the plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that the plaintiff is a *bona fide* holder of the note; that he purchased it for value before maturity, without knowledge of any infirmity therein, or of any facts indicating bad faith in taking it." The facts of that case were very much like those in the case at bar. We are therefore of opinion that the evidence does not support the verdict.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

ANNA M. LARR, APPELLEE, V. PAUL STEIN ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,965.

Judgment: SUMMONS: SETTING ASIDE RETURN. The return of an officer that he has served a summons cannot be impeached, except by clear and satisfactory evidence; but, if the evidence is sufficient, a judgment based upon a false return may be set aside in equity.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

John Macfarland and *A. J. Kinnersley,* for appellants.

W. C. Fraser, contra.

LETTON, J.

Action in equity to set aside a judgment and to recover money paid thereunder. Plaintiff prevailed, and defendant appeals.

The plaintiff, whose name was formerly Petersen, married one Larr in June, 1911. On July 14, 1911, she was sued in justice court under the name of Anna M. Petersen by the defendant Macfarland, who is an attorney at law, to recover the sum of $200, which he alleged was due him for legal services. A summons was issued and a return made by defendant Stein, who was then constable, certifying that he had made personal service upon Anna M. Petersen on the 18th of July, 1911. No appearance was made, and judgment by default was rendered for $200 and costs. This judgment was transcripted to the district court, where certain proceedings in garnishment were had and money seized. In that court plaintiff herein appeared, and moved to dismiss the proceedings on two grounds: First, that the garnishee received the money in his hands as clerk of the district court, and the fund was for that reason not subject to garnishment; second, that the judgment in the justice court upon which the proceedings were based was

null and void. The district court found that Macfarland was entitled to have the money in the hands of the garnishee paid to him upon the judgment, and $185 was so paid.

Plaintiff alleged that she had no knowledge of the proceedings in the justice court until after the garnishment proceedings were begun, that she had never been served with a summons, and that she was not indebted to Mr. Macfarland. The answer pleads the validity of the judgment in the justice court, that the issues in this case were adjudicated in the garnishment proceedings in the district court, and alleges that Mr. Macfarland performed legal services for the plaintiff of the value of $200.

Plaintiff called the constable as her first witness. He testified that he served the summons upon her personally in a two-story boarding or rooming house on Twenty-third street, north of Clark street, in Omaha; that the house was numbered about 1810 or 1812; that plaintiff lived upon the lower floor, and was upon the porch when he served her. He testified that Mrs. Larr, who was in the court room, "is the lady * * * to the best of my recollection." Mrs. Larr testified that, with her husband, she lived until the fall of 1911 at Twenty-fourth and Charles street in a two-story house; that the lower part was rented to another family; that they lived upstairs, and that the entrance to their rooms was by an outdoor stairway; that in September of that year the building was moved a distance of about four blocks to the neighborhood of Twenty-third and Clark street, where they afterwards lived. She testified positively that she never was served with a summons in the justice court case; that she knew Stein by sight, and knew he was a constable, but she never knew that Macfarland made any claim for services, and never heard of the suit until after garnishment proceedings were begun. She testified she had a written contract with Mr. Macfarland, whereby he was to have an interest in a lot for certain service to be rendered, but says that the service was never performed, and that by mutual agreement the contract was canceled and revoked, and he has performed

no service for her of any kind. Mr. Larr testified that during the whole month of July, 1911, he was sick at home, and corroborates her testimony as to living then upstairs at Twenty-fourth and Charles street, and as to the moving of the house. The evidence of these two witnesses as to their residence was not disputed. We are satisfied from the evidence that the summons had never been served.

The questions as to whether plaintiff was indebted to Macfarland for services and whether the surrender of the written contract terminated their relations are more difficult to solve. Both Mr. Macfarland and his stenographer testify to several conversations in Mr. Macfarland's office between him and plaintiff. The stenographer says she heard Mr. Macfarland say he would surrender the contract if plaintiff would pay him. Were it not for the fact of the destruction of the written contract by mutual consent, we would be inclined to take the view that some service at least had been performed, for which compensation should be paid; but, considering all the testimony on this point, and giving the findings of the district court due consideration, we have come to the same conclusion as did that court, and are of the opinion that plaintiff was entitled to the relief prayed.

Defendant contends that the question as to the validity of the judgment was tried and determined in the garnishment proceedings in the district court. The proof shows that no testimony was taken upon this issue, and no finding was made by the court. The court evidently was of opinion that such a collateral attack could not be made upon the judgment.

The judgment of the district court is

AFFIRMED.

BARNES and SEDGWICK, JJ., not sitting.

PHILIP KRUM, APPELLEE, V. SULLIVAN & SCHABERG TRANSFER & FUEL COMPANY, APPELLANT.

FILED JANUARY 2, 1915. No. 17,989.

1. **Jury**: CHALLENGE: PARTY TO PENDING ACTION. The trial of this case took place in December, during the October term of the district court. Upon the *voir dire* it was disclosed that one of the jurors was a member of the board of trustees of the village of Bethany. In the month of October an action in equity brought by certain individuals to disconnect territory from that village had been tried and determined. In that action the summons was served upon this juror. He was challenged for cause under section 8158, Rev. St. 1913, on the ground that he was a party to a suit pending for trial in the court at the term. Under a later statute governing the selection of juries in Lancaster county, the juror could not have been selected or summoned, nor could he have sat in the month of October. He had no personal interest in the action to disconnect territory. *Held*, That under these circumstances it was not erroneous to overrule the challenge.
2. ———: ———: CONSULTATION WITH COUNSEL. It is not reversible error to overrule a challenge for cause, on the ground that the juror has consulted one of the opposite counsel in a legal proceeding.
3. **Master and Servant**: ACTION FOR INJURIES: SUFFICIENCY OF EVIDENCE. Conflicting evidence set forth in the opinion examined, and *held* to be sufficient to sustain the verdict.
4. **Appeal**: ARGUMENT OF COUNSEL. It is erroneous and may be prejudicial for counsel in the closing argument to make improper statements not within the issues. Courts should interfere, even upon their own motion, to prevent an unwarranted appeal to the passions or prejudice of jurors; but, when an objection to an improper remark is sustained, a judgment will not be reversed on account of it, unless this court is of the opinion that the statements have influenced the jury so as to prejudice the substantial rights of the complaining party.
5. **Damages.** Where a teamster 24 years old suffered a compound fracture of both bones of the left forearm, the flesh and tissues were torn and lacerated, he was incapacitated for labor for more than a year, suffered four surgical operations at intervals during this period, lost the control of one finger, the injury resulted in the permanent shortening of the arm, and the bill for surgical

and hospital expenses amounted to over $750, a recovery of $5,026 *held* not to be excessive.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Jesse L. Root, E. C. Strode and *Max V. Beghtol,* for appellant.

J. B. Strode and *G. E. Hager, contra.*

LETTON, J.

Action for personal injuries. Plaintiff recovered, and defendant appeals. The plaintiff was a teamster in the employment of defendant, which is a draying company. At the time of the accident he was about 24 years old. He had worked for defendant for about four months and was earning $47.50 a month. On the day of the accident the defendant was engaged in unloading and delivering two large steam boilers, each six feet in diameter, eight feet long, and weighing about eight tons. Each boiler was upon a separate flat-car. These boilers were unloaded by placing skids so as to form an inclined plane upon one side. An unloading apparatus was then made by making a chain loop around the rail of a side-track, on the other side of the flat-car and parallel thereto, fastening a rope to the chain, thence passing the rope twice around each end of the boiler, bringing the rope back to the chain, where a rope loop was made through which the rope was passed and then wrapped a number of times around the ropes leading to the boiler, at right angles; the free end was then held by a man at right angles to the line, so that when the boiler started to roll down the skids the friction of the wrapped ropes upon the ropes leading to the boiler acted as a brake, and the man holding the end could gradually pay out the rope, and thus control the movement of the boiler down the skids. The first boiler had been unloaded safely in this manner. The testimony shows that this is the usual and customary method of unloading articles of this nature among those engaged in the busi-

ness. Plaintiff's evidence is to the effect that a separate rope was used at each end of the boiler when the first boiler was unloaded, but that at the unloading of the second boiler a rope about 600 feet long was used, each end being made fast to each end of the boiler and the coil of slack placed in the middle between the two end ropes. It was upon January 25, and about 5 o'clock in the evening or later, when the ropes had been placed around the second boiler. The management of the operations was in the hands of Mr. Sullivan, who gave directions to the men employed, of whom there were five. The plaintiff was stationed at one rope and two men were stationed at the other for the purpose of paying out the rope as it descended. When the word was given to start the boiler, it was pried off the flat-car and onto the skids, and instantly the plaintiff was jerked forward, and his arm caught in the loop formed by the slack rope. Both bones of his arm were broken and protruded, and the flesh was severely lacerated, cut and torn.

The particular acts of negligence charged in the petition are that, instead of following the plan used in lowering the first boiler, the defendant changed the manner of placing the ropes about the boiler, and, instead of using two ropes, carelessly and negligently used only one rope for that purpose; that, instead of taking the loose end of the rope in a half hitch around a stable and solid object and wrapping or entwining it about the other portion of the rope in order to give the one holding it greater purchase and holding power defendant carelessly and negligently failed so to do, and carelessly directed the plaintiff to take hold of the rope and permit it to loosen gradually so as to lower the boiler, and that, because of the careless and dangerous way in which the rope had been placed by defendant, when the weight of the boiler came upon it, it failed to hold, and the plaintiff's arm became entangled. The defendant pleads assumption of risk and contributory negligence.

The evidence is clear that, in order to secure sufficient friction to lower such a boiler safely, it is essential that

the rope, after being placed through the loop, be wrapped at right angles a number of times around the ropes leading to the boiler, and that, unless this is done, it would be impossible for two men, one at each end of the boiler, to hold eight tons when rolling down the inclined plane. The principal conflict in the evidence is with respect to whether the rope which the plaintiff was holding was wrapped a sufficient number of times around the boiler rope, and also as to whether there was greater danger in using two ends of a long rope with a loose coil in the middle between the ropes than in using a separate rope for each end. It was shown that, where the ends of a single rope were used, when the end was brought back from the boiler passed through the loop, and wrapped the other ropes, the slack would form a loop, while if two separate ropes were used no loop would be formed. If a man stationed to pay out the rope was suddenly jerked forward, the loop formed by using one rope only would be more apt to catch his arm. We think there is sufficient evidence to sustain the finding of the jury that proper care had not been used with respect to wrapping the rope a sufficient number of times, and that the use of a single rope was more dangerous than the other method.

The first assignment is that the court erred in overruling defendant's challenge to the juror Armstrong. Section 8158, Rev. St. 1913, provides that it shall be sufficient cause for the challenge of a juror, "that he is a party to a suit pending for trial in that court, at that term." The evidence shows that Mr. Armstrong was a member of the board of trustees of the village of Bethany, and that a summons was served upon him as such officer in an action in equity brought by certain individuals to disconnect territory from the village. The case was tried to the court and determined in October, 1912. The present action was tried in December, 1912, at the same term. Under the statute, Mr. Armstrong had not been selected as a juror and did not sit in October. Mr. Armstrong's name did not appear as a party to the suit and he had no personal interest in it. There are two reasons why this assignment

should not be sustained: First. Mr. Armstrong was not, strictly speaking, a party to the suit. If the evidence had indicated a personal interest in the controversy, even though his name did not appear, we might perhaps conclude that the word "party" would be sufficiently broad to include him. Second. The evident object of the statute was to prevent a person from acting as a member of the regular panel, who in all probability would be in close association with his fellow jurors during the term, and whose personal relations with them might be calculated to sway their judgment or gain their favor. This would give him an unfair advantage over his adversary. We have no doubt that it would be reversible error for a court to permit a member of the jury, who had a jury case pending at the time for which he was summoned, to sit as a member of the panel. This would permit the very evil which the statute was designed to correct. Defendant has quoted cases from Tennessee and Illinois holding that the statute is to be construed literally. These cases were decided at a time when courts were much more inclined to enforce technical rules, regardless of the reason of the rule, than they are at present. Considering the circumstances of this case, we can see no prejudice to defendant in retaining this juror.

It is urged that the juror had consulted with Mr. Strode, counsel for the village, who is one of the attorneys for the plaintiff. This, however, while it might justify defendant in using a peremptory challenge in order to remove the juror, is not a ground to excuse a juror for cause under the statute.

It is next contended that the evidence is insufficient to sustain the verdict. We have already stated the substance of the proof. It is said, however, that all the witnesses said the rope was wrapped around twice and that this must be true, otherwise the boiler could not have been stopped when it started to roll. The evidence shows that the plaintiff's arm held the rope from going through the loop. This stopped that end of the boiler. Two men were holding the rope at the other end and apparently stopped

that end. Furthermore, the boiler was blocked as soon as it was learned the plaintiff was caught in the rope. There is a conflict as to whether one or two ropes were used in unloading the first boiler, also in regard to the amount of wrapping of the rope the second time. It is not very clear from the plaintiff's witnesses whether the rope was wrapped around once, or twice, or at all the second time. These witnesses were German, and they had some difficulty in expressing themselves clearly in English. Defendant's witnesses said that Sullivan ran the end of the rope through the loop and gave it three or four twists on the line on both sides. The testimony for the plaintiff, if believed, justified the conclusion that the rope was not wrapped more than twice at the most, while there is testimony that it should have been wrapped at least six times. It is also shown by defendant that if the rope was not wrapped it would be impossible to hold the boiler. It seems clear that the rope was not wrapped sufficiently or the accident would not have happened, and it is also clear that the plaintiff was inexperienced, trusted to Mr. Sullivan, and obeyed his orders.

It is next assigned that the court erred in allowing the attorney for plaintiff to appeal to the prejudice of the jury by referring to plaintiff's family and his property. The remark of counsel to which the first objection was taken is only in the record by inference from the objection, but the court sustained the objection. The jury should also have been told to ignore the statement.

The record also shows that counsel said: "Which will you do, let the Sullivan-Schaberg company go without paying anything, or make a pauper out of him, with these debts on his hands, without giving him anything?" This was objected to and the objection overruled. The question at issue was not whether the plaintiff was or would become a pauper, but it was whether the defendant had been guilty of actionable negligence. But we cannot say that the remark itself excited the passions or prejudices of the jury. The record showed that the plaintiff was a laboring man receiving $47.50 a month; that the accident had prevented

him from working for more than a year; and that he had incurred debts amounting to over $750 for surgical care and hospital expenses. These were evidently the debts referred to. Under all the circumstances, we do not think the statement was prejudicially erroneous. The language of counsel was flamboyant and oratorical. It would have been better to have left it unsaid. Counsel should be scrupulous to avoid improper statements not within the issues, and courts should interfere, even upon their own motion, to prevent an unwarranted appeal to the passions or prejudices of jurors.

It is next assigned that the court erred in allowing a temporary model to be used in the district court. The same model was used in the argument before this court and no serious complaint was made. It assisted us to obtain an idea of the manner in which the ropes were used, and we find no error in allowing its use.

It is next insisted that the verdict was excessive. The evidence shows that both bones of the plaintiff's arm were broken near the wrist; that the flesh and tissues were so torn and cut that only a strip of flesh and skin was left by which the hand remained attached to the arm; that he was six weeks at the hospital the first time, but after going home the wound was dressed every other day for a month. He then returned to the hospital for a second operation. He remained there for three or four weeks. After this the wound was again dressed at his home for about a month. He was compelled to go to the hospital a third time for another operation, where he stayed three or four weeks. After that still another operation had to be performed to withdraw some wires which had been used to hold the bones of his arm together. It is also shown that he suffered pain for more than a year; that he has no control over his first finger and that the left arm is about two inches shorter than the right. The evidence shows that the surgical and hospital charges are over $750. The jury rendered a verdict for $7,526. The district court required a remittitur of $2,500, which was made, so that the ques-

tion before us is whether a recovery of $5,026 is excessive under the facts proved.

The plaintiff endured great pain and suffered permanent injury. Considering the loss of wages during the time that he was entirely incapacitated and the surgical and hospital expenses, there is left as compensation for his suffering, for the shortening of his arm, and for the loss of the use of the first finger about $3,500. We do not consider this excessive.

The judgment of the district court is

AFFIRMED.

BARNES and HAMER, JJ., not sitting.

FULLER SHELLENBERGER V. STATE OF NEBRASKA.

FILED JANUARY 2, 1915. No. 18,636.

1. **Criminal Law**: EVIDENCE: CONFESSIONS. The accused, while in a precarious condition from being overheated, was cared for by the sheriff at Burlington, Kansas. Upon his making inquiry as to the relatives of the accused so that they might be notified in order to care for him Shellenberger requested that the officers at Nebraska City be informed, giving as a reason that he had been implicated in a murder near that place. The sheriff wrote to Nebraska City, but the officers referred to took no action. Upon being so informed, accused requested that the sheriff of Nemaha county, Nebraska, be notified, and told that he had been implicated in a murder committed in that county some 13 or 14 years before. He gave the details of the murder at length, which he repeated to the sheriff of Nemaha county when he arrived. *Held*, That the confession being voluntarily made before arrest, and before any accusation had been made, was properly received in evidence.

2. ———: ———: ———. The father of the accused was for years afflicted with Saint Vitus dance. His mother was a woman of violent temper and an epileptic. In his boyhood the accused was also afflicted with Saint Vitus dance. He is below the average in intelligence. The evidence, unaided by the confession, is not sufficient to sustain a conviction. Under these circumstances, every fact tending to throw any light upon the truth or falsity of the confession should be submitted to the jury, and since mental

tendencies, peculiarities and predispositions may extend over a lifetime, the fact that he had made a false confession in 1890 that he was guilty of another murder was not too remote to be admissible in evidence.

3. ———: REVERSAL: EXCLUSION OF EVIDENCE. A double murder was committed near the city of Omaha in 1890. The guilty person was apprehended, tried, convicted, and executed. Soon after the murder, defendant was arrested, charged with complicity in that crime, to which he made a confession. It was afterward shown that the confession was untrue, and the prosecution was dismissed. At this trial, in order to aid the jury to determine the weight to be given to the confession made by accused as to the murder of Bahuaud and to show the abnormal condition of the defendant's mind, it was sought to prove that he had made such previous false confession. This evidence was excluded upon objection by the state. *Held*, That this ruling was prejudicially erroneous.

4. ———: CAUTIONARY INSTRUCTION: POLICE OFFICERS. A cautionary instruction as to the evidence of police officers is only proper to be given when the officer is a witness for the state in the endeavor to convict the accused.

5. ———: EVIDENCE: OPINIONS. A nonexpert witness may, after detailing the facts and circumstances upon which he bases his opinion, give his opinion upon the question of sanity, but he is not permitted to express his opinion without disclosing the facts upon which it is based.

6. ———: IRRELEVANT EVIDENCE. Error cannot be predicated upon the admission of testimony which at the time seems relevant. If by reason of further facts it appears to be irrelevant and prejudicial, defendant should move to strike it from the consideration of the jury, otherwise he cannot complain.

7. ———: INSTRUCTIONS: CONFESSION. An instruction, which stated in direct terms that "the confession of defendant, if he made such confession, is competent evidence to prove his connection with such crime," without further instruction sufficiently qualifying the direct statement under the facts in this case, should not have been given.

8. ———: ———: REASONABLE DOUBT. Instructions given upon the subject of reasonable doubt criticized.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

John C. Watson and *Max M. Cohn*, for plaintiff in error.

Grant G. Martin, Attorney General, Frank E. Edgerton and *Fred G. Howxby, contra.*

LETTON, J.

Plaintiff in error, hereinafter termed the defendant, was indicted on November 14, 1913, upon the charge that upon the 16th day of June, 1899, he murdered one Julian Bahuaud, in the attempt to perpetrate a robbery, by striking him on the head with a blunt instrument. He pleaded not guilty, was tried, and was convicted of murder in the first degree. The jury fixed the penalty at imprisonment for life, to which term he was sentenced. He brings the case here by proceedings in error.

The proof that a murder was committed is positive and undisputed. Bahuaud was an old man, something of a recluse, who lived alone on a farm a short distance from the village of Julian. On the afternoon of Sunday, June 18, 1899, some neighbors found his body lying on the bed in his house. Decomposition had set in, and it was apparent that he had been dead from 24 to 48 hours, according to the medical testimony. His skull was crushed, apparently by a blow from some blunt instrument. His house had been ransacked, drawers were opened, and a tin box, which apparently had contained papers, was found upstairs with the lid cut open. A print of bloody fingers was on the stairway wall. A chair was displaced and a bench overturned in the kitchen. Some empty dishes and a candle were standing on the table. An inquest was held at once. No clue to the perpetrators of the crime was found.

On June 28, 1913, Sheriff Grubb of Coffey county, Kansas, was called into the country near-by by a telephone message that there was a sick man on the public highway. He went out, and found the defendant lying by the roadside overcome by heat. He took him to Burlington, put him in the jail, and called the county physician. The doctor examined him, and told the sheriff that he was suffering from heat, had a fever, and that he could not tell what might happen. The sheriff told the defendant that the doctor said he was in a bad condition, and, if he had

any people, probably he had better communicate with them so that they could come and get him, or take care of him. Defendant told the sheriff to notify the officers at Nebraska City to come and get him; that he was implicated in a murder which took place there in a big cut near the wagon bridge down by the river. The officers at Nebraska City were notified, but none came. The sheriff testified that, when the officers did not come from Nebraska City, defendant told him about the murder of Julian Bahuaud. He said that he and two other men met in the back part of a barber shop in Julian; that they afterwards met at a street corner and walked upon the railroad to Bahuaud's home; that as they went up they looked in at the window and saw the old man eating his supper, his back towards the door; it was about dusk; that one of them hit him on the head with a stone tied in a handkerchief; that it was not their intention to kill him, but to commit a robbery; that after they found he was dead they carried him and laid him on the bed. He said that he went outside to watch, and the others went upstairs and found a tin box in which they found some money; that they went back up the railroad to town, and he went back to where he was working in the country. The witness asked him about the blood on the wall of the stairway, and he said one of them cut his hand in opening the tin box, and coming down stairs left blood on the wall or the banister.

W. H. Jones, sheriff of Nemaha county, Nebraska, testified that he went to Burlington, saw the defendant in jail at that place, and had three conversations with him. The statements made by defendant, in substance, were the same as those made to Sheriff Grubb, but, in addition, defendant said that it was about eight or half past in the evening, and that the lamp was lighted; that Gibbs slipped in and hit Bahuaud; that the others got about $800 or $1,000 from the tin box, and that he got $200 in money. In the third talk he added that he was working at the time for Henry Levigne, and that he stopped work about the middle of the afternoon that day and went to Julian. After repeated questioning, he finally told him that one

of the men was Frank Gibbs, and that the other was a little fellow called Joe, but he could not remember his last name. On the witness asking if it was Joe Kopf, he said, "Yes, it was." He also told that he remained in the neighborhood of Julian for about a year, when one Sunday he heard a Mr. Cook say, "Let's hang Shellenberger for killing old man Julian;" that he then thought they knew about it, and went away. He afterwards said to the witness he did not see Gibbs strike the deceased. The witness said that he suggested the name of Joe Kopf to defendant because a number of people were suspicious that he was one of the parties who committed the murder.

Mr. Levigne testified that defendant worked for him in June, 1899, and, by referring to his account book, that on the 16th of June he worked three-quarters of the day, being off duty the latter part of the day, and that he did not see him again until next morning. On cross-examination he testified that he did not remember whether defendant was at home for supper that evening, he could not be positive. He also said it was not unusual for defendant to take a half or three-quarters of a day off, and go to town, and that defendant continued to work for him until the 4th of August.

The witness Cook testified to making a joking remark about a year after the event, proposing to hang Shellenberger for Bahuaud's murder. He described the surroundings of the house, and said that the window in Bahuaud's kitchen was a half window, and so high that a man could not look into it from the ground outside, the top of it going close to the ceiling. The house stood about two feet above the ground, and, while one could see out from the inside, he could not see in from the outside. The state also showed by this witness that defendant, a year or two before the murder, worked on an adjoining farm to that of deceased, and lived one winter in a cabin about 30 rods from Bahuaud's house. The foregoing is a much condensed statement of the essential facts proved by the state.

For the defense, one group of witnesses was called to prove that defendant was weak-minded, or defective men-

tally, and that he had a mania or predisposition to make false confessions that he was implicated in serious crimes. Another group, among whom was Kopf himself, was called to prove an alibi for Kopf. Defendant also took the stand. He admitted that he made nearly all the statements testified to by Jones and Grubb, but declared them to be false, and said he could not tell why he made them. He also testified that he remained in the neighborhood of Julian and Nebraska City for four or five years after the remark made by Cook, to which allusion had been made, which he said was made in a joking manner, and to which he paid no attention. A doctor testified that with other physicians he made a physical examination of defendant, and found scars caused by syphilitic lesions, and that syphilis is apt to affect the mental soundness of those afflicted with it, and cause degeneracy, loss of mind or mental capacity.

In rebuttal, two other physicians were called who had participated in the examination of defendant. These testified they found no evidence of syphilis, and that defendant was not weak-minded, but was mentally dull. Several witnesses testified that soon after the murder Kopf's hand was wrapped up.

Over 100 assignments of error are made in the petition in error. We cannot consider them all with due regard to the rights of other litigants.

It is strenuously insisted that the confessions made to Sheriff Grubb and Sheriff Jones were not voluntarily made, and are for that reason inadmissible. At the time these were made defendant was suffering from a heat stroke, and had been taken to the county jail, not because he was accused of any crime, but in order to give him proper care. The statements made by him to Sheriff Grubb, both as to a murder at Nebraska City and the Bahuaud murder, seem to have been entirely voluntary on his part. He was apparently unrestrained except by his own physical condition. No compulsion is shown as to the statement to Sheriff Jones. We have no doubt that the statements made were proper to be received in evidence in connection with all the testimony as to the circumstances under which they

were made, and it was for the jury, and not for the court, to say what, if any, weight should be given to them.

Error is assigned upon the exclusion of the testimony of several witnesses as to a confession made by defendant, years before, that he was guilty of another murder.

The testimony of T. J. Mahoney, of Omaha, was taken out of the hearing of the jury in order to accommodate the witness, and it was afterwards offered on the part of defendant as a deposition by consent of counsel. The gist of Mr. Mahoney's testimony was that in 1890 a Mr. and Mrs. Jones were murdered in Douglas county; that at that time Mr. Mahoney was prosecuting attorney for that county; that one Neal was arrested and charged with the crime; that Neal made a statement which implicated the defendant; that defendant was arrested and taken to Douglas county, and, while in custody, confessed that he went with Neal to the farm where Mr. and Mrs. Jones lived to steal horses and cattle; that he saw Neal shoot them, and that Neal gave him the revolver, which he threw into a stream near-by. Mr. Mahoney then questioned him as to the locality of the crime and the situation of the buildings upon the farm. He did not reply, and seemed unable to do so, but when leading questions which suggested answers were put he brightened up and answered, "Yes;" that most of these questions suggested things contrary to the fact, but that defendant readily answered "Yes" to any of them. A complaint and information was filed against him by the witness, but upon further investigation the prosecution was dropped and Shellenberger discharged. Questions as to the defendant's mental condition at that time were excluded upon objections by the state. Nearly all of this testimony was excluded as too remote and immaterial, and was not read to the jury.

The testimony of H. P. Hayes was taken in the same manner, and much of it excluded as too remote. He testified that he was chief detective of the Omaha police force at the time of the Jones murder; that after Shellenberger was arrested for that crime he talked with him several times with regard to it; that Shellenberger stated, in sub-

stance that he was associated with Neal in the murder, giving details; that upon inquiry it was found that he could not describe anything about the farm, which led to an investigation at Nebraska City, and that following this investigation the defendant was discharged.

George W. Leidigh testified that he had lived in the state of Nebraska for 43 years, had been warden of the state penitentiary, and had been a member of the legislature for several terms; that in February, 1890, defendant worked for him at Nebraska City for a week or ten days putting up ice, and including the 4th of February, which was the date of the Jones murder. He produced a check dated the 4th of February, and stated that he delivered that check to Shellenberger between the hours of 8 and 10 o'clock at night on that day; that he always paid his men in the evening after they were through work; that in the course of business this check was returned to him, and that he afterwards took it to Omaha and delivered it to Mr. Mahoney, who afterwards returned it to him. Both Hayes and this witness positively identified the defendant as being the Joseph Shellenberger who was charged with the Jones murder and who made the confession. The witness was then asked with respect to conversations which he had with defendant at that time, with reference to the confession and other talks and acts of defendant with the object of laying a foundation for his opinion as to sanity. This was objected to and excluded, and an offer to prove denied.

Mr. Chapman, who served as mayor of Nebraska City, and who had lived in Nebraska City for 30 years, testified that the defendant was commonly known by the name of Joe Shellenberger; that his parents lived upon a small farm which the witness owned, and that he was on quite intimate terms with the defendant and his family; that defendant's mother was a woman of high temper, would have tantrums, would go about the house talking to herself, and at times would fight with any member of the family; that she suffered from epileptic fits, would fall down and froth at the mouth; that defendant's father was

afflicted with Saint Vitus dance for many years and finally died from that affliction; that the defendant, when he was a boy on the farm, was afflicted with Saint Vitus dance and was a very nervous boy.

It was also shown that the defendant is without education, unable to read or write, and below the average in intelligence; he had been a wanderer from place to place both before and after 1899, changing his name from time to time, sometimes working as a farm hand or laborer, sometimes apparently engaged in petty crimes. With such testimony in relation to defendant's character and life, and under the peculiar conditions of this case, where the truth of the confession is the most material matter in the controversy, it seems to us essential to a fair trial that every fact which would throw any light upon its truth or falsity should be submitted to the jury. The state insists that the testimony with reference to defendant's confession or implication in the murder of Mr. and Mrs. Jones is too remote in point of time to be of any weight; but it must be remembered that the subject of investigation is the mental condition and peculiarities of defendant, that the motive for the confession is material, and that a peculiar mental bias, weakness or tendency may extend for a lifetime. There is often a persistency in both mental and physical habits that is remarkable, and a defective mind may continue as it was in childhood.

The defendant stood charged with a crime punishable by the extreme penalty of the law. If he is a degenerate or defective, there is the more reason for care and caution that every provision which the law offers for the protection of those accused of crime should be allowed. There are numerous cases upon record where men have voluntarily confessed themselves to be guilty of atrocious crimes, where investigation has proved their innocence, and the confession could only be attributed to a defective or abnormal mentality. This is said, not as indicating or expressing any opinion as to the guilt or innocence of the defendant, but merely to emphasize the necessity of extreme care to allow the accused a full opportunity to make his defense.

After a careful consideration of all the testimony in the record, we are satisfied that without the confession there is not sufficient evidence to sustain the conviction. The most important inquiry therefore—the vital question in the case—is what weight and value should be given to the confession as evidence. To determine this, all the testimony bearing upon defendant's physical and mental condition, both at the time of the confession and before, the tendencies which he may have inherited, his manner of life, and the fact that he confessed to other homicides of which he could not have been guilty, should all be taken into consideration. We are of opinion that evidence as to any fact occurring during the life of this defendant which is in any way calculated to throw light upon the credibilty of his confession is material to the issues, should have been submitted to the jury, and that it was prejudicial to his rights to exclude it.

The court gave the following instruction: "A certain police officer has testified in this case, and you are instructed that under the laws of this state, in weighing his testimony, a greater care should be used, because of the natural and unavoidable tendency of such persons in procuring and stating evidence against the accused." The witness Hayes is the only police officer who was sworn. His testimony was for defendant. Instructions of this nature are countenanced by the courts in behalf of a defendant, in order to call attention of the jury to the fact that the hunting instinct still exists, and that men whose duty it is to prosecute criminals sometimes allow their zeal, perhaps unconsciously, to color or bias their testimony in the endeavor to procure conviction. This is the only reason why such instructions are permitted. If this instruction had any effect, it could only be to disparage the testimony of Hayes.

It is said that the court erred in refusing to permit the defendant to show, by several witnesses called by him, that, in the opinion of each of them, the defendant was insane on the subject of confessions implicating himself in crimes. We think that in the main the court was justi-

fied in excluding this evidence. The settled rule is that a nonexpert may, after detailing to the jury at length the facts and circumstances upon which he bases his opinion, give his opinion upon the question of sanity. Not being an expert, after he has given the facts upon which he bases his opinion, the jury are as well fitted to decide the question as the witness, and he is, therefore, not permitted to express his opinion without disclosing the facts upon which he bases it. This rule of the law of evidence is so elementary as to require no authorities to support it.

Complaint is made with respect to the admission of the testimony of Cook as to the remark that was made by him to Shellenberger which has been alluded to. Since the defendant told this to the sheriff at Burlington, it was proper to allow the witness Cook to testify to it also, as corroboration of the confession and as showing a motive for flight. Its effect as evidence, however, practically disappeared when it was shown that, though Cook had not seen the defendant afterwards until the trial, Shellenberger remained in the vicinity for at least four or five years afterwards. If it was desired to exclude the testimony, defendant should have moved the court to remove its consideration from the jury, since it was only proper to receive it to show a motive for flight on account of fear that his guilt was suspected, and in connection with evidence that he actually fled or went in hiding.

Error is assigned on account of instruction No. 20, which is as follows: "The court instructs the jury that if the prosecution in this case has proved, independent of the confession of the defendant, beyond a reasonable doubt that Julian Bahuaud was killed on the 16th day of June, 1899, as alleged in the indictment in this case, then the confession of the defendant if he made such confession, is competent evidence to prove his connection with said crime, and may, with slight corroboration, be sufficient to convict." The complaint is that there was no proof outside of the confession to show defendant's connection with the crime, and that it was erroneous to say "that the confession of the defendant, if he made such confession, is

competent evidence to prove his connection with said crime." We think there was no error in the preliminary statement as to the fact of the murder, but we agree with the defendant that the latter part of the instruction, which tells the jury that "the confession, of the defendant, if he made such confession, is competent evidence to prove his conection with said crime," is too broad a statement. It is true the confession *may* be competent evidence, but this can only be so if the jury are satisfied that the defendant made it voluntarily and understandingly, and not by reason of mental weakness or obliquity. In other words, the instruction seems to determine as a matter of law that the confession "is competent evidence," while it was for the jury to determine its competency and weight as evidence.

Complaint is made as to the giving of instructions Nos. 12 and 13, defining reasonable doubt. In *Blue v. State,* 86 Neb. 189, in the opinion by Sedgwick, J., some of the language of this instruction is considered at some length and condemned. It is then suggested that the instruction upon reasonable doubt given by Chief Justice Shaw in the trial of Professor Webster for the murder of Parkman (*Commonwealth v. Webster,* 5 Cush. (Mass.) 295, 320), which was expressly approved in this state in *Carr v. State,* 23 Neb. 749, is a model which may well be followed by our trial courts. It was said in *Flege v. State,* 90 Neb. 390, 401, by a minority of the court, and in *Bartels v. State,* 91 Neb. 575, by a divided court, that an instruction similar to No. 12 was erroneous, and was prejudicially erroneous in those cases.

The case is a difficult one. On the one hand, the story told by Shellenberger seems to be corroborated by the physical facts surrounding the tragedy; on the other hand, an abnormal and defective individual, with a vivid imagination uncontrolled by sound reason, living at the time in the neighborhood of the crime, at the house of a man who had attended the inquest, where all the circumstances and details were matters of common discussion and general knowledge, might, years afterwards, relate

these incidents and by an exaggerated egoism, if his mental peculiarities ran in that direction, accuse himself of the crime. Such instances have not been uncommon in the history of criminal law in England and in this country. Even in this state in recent years, unfounded confessions of murder have been made, and the confessing party acquitted when all the facts were disclosed. The defendant may be guilty, but the orderly and impartial administration of justice and the dignity and welfare of the commonwealth demand he be afforded the opportunity to produce before the jury all of the material and competent evidence upon which he relies.

The judgment of the district court is

REVERSED.

ROSE, J., not sitting.

FAWCETT, J. I concur in the views of the majority as general legal propositions, but under the evidence in the record, taken as a whole, I do not think they justify a reversal.

FARMERS CO-OPERATIVE CREAMERY & SUPPLY COMPANY, APPELLEE, V. HENRY S. MCDONALD ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 18,795.

Taxation: BOARD OF EQUALIZATION: INCREASE OF ASSESSMENT: INJUNCTION. Under the provisions of section 6456, Rev. St. 1913, a county board of equalization must adjourn from time to time until the action of the state board of equalization shall have been had and certified to the county clerk. Since the state board is not authorized to meet until the third Monday in July of each year, a petition to enjoin the collection of a tax upon the sole ground that an increase in a personal assessment was made by the county board of equalization upon July 1 does not state a cause of action.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

George A. Magney, Charles Haffke, Benjamin S. Baker and *John A. Rine*, for appellants.

R. M. Switzler, contra.

LETTON, J.

Action to set aside an increased assessment made by the county board of equalization of Douglas county and to enjoin the collection of a tax based thereon. A demurrer to the petition was overruled. The defendant stood upon the demurrer. Judgment was rendered as prayed. Defendants appeal.

In substance, the petition alleges that in 1913 the county assessor valued and assessed the personal property of plaintiff for that year at $22,550. That the board of equalization met on June 10, 1913, for the purpose of equalizing valuations, and that on July 1, 1913, the board raised the valuation of the property of plaintiff to the sum of $80,000, and caused this increased valuation to be placed upon the assessment rolls for taxation purposes.

Plaintiff insists that the tax is void for the reason that the board of equalization is a tribunal of limited jurisdiction, and had no authority to act to increase the valuation after the expiration of 20 days from the first Tuesday after the second Monday in June. This is the sole complaint made.

Section 6437, Rev. St. 1913, is, so far as applicable, as follows: "The county board (of equalization) shall hold a session of not less than three and not more than twenty days, for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year." This portion of section 6437 must be construed in connection with sections 6456 and 6447. Section 6456 provides: "The county board of equalization shall adjourn from time to time until the action of the state board of equalization and assessment shall have been had and certified to the county clerk, and, on the last day of sitting as a board of equalization, the county board shall levy the necessary taxes for the current year." Sec-

tion 6447 provides: "The state board of equalization and assessment shall, on the third Monday of July of each year, meet at the state capitol for the purpose of equalizing assessments."

The increase in the assessment was made on the 1st of July. Under the statute the board had authority to act until after the third Monday in July. The petition does not state a cause of action.

The judgment of the district court is

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

The following opinion on motion for rehearing was filed March 13, 1915. *Former opinion modified and rehearing denied.*

Taxation: ASSESSMENT: EQUALIZATION: TIME WITHIN WHICH TO BE MADE. A county board of equalization is required to equalize and correct assessments in time for the county clerk to prepare and forward an abstract of the assessment rolls to the state board of equalization and assessment on or before July 10 of each year.

PER CURIAM.

On motion for rehearing our attention for the first time was called to section 6442, Rev. St. 1913, which provides in substance that the county assessor, immediately after the board of equalization shall have completed its labors, shall prepare an abstract of the assessment rolls, the values to be given as equalized and corrected by the county board, and forward it to the state board of equalization and assessment on or before the 10th day of July. This, of course, limits the time within which the county board of equalization may act. The statement in the former opinion, "Under the statute the board had authority to act until after the third Monday in July," is therefore incorrect, and the opinion is modified accordingly.

This, however, does not affect the former judgment, since the action of which complaint is made was had upon July 1. The motion for rehearing is therefore

OVERRULED.

DAVID COLE CREAMERY CO., APPELLEE, V. HENRY S. MCDONALD ET AL., APPELLANTS. No. 18,796.
KIRSCHBRAUN & SONS V. MCDONALD. No. 18,797.
BUSHMAN WAREHOUSE CO. V. MCDONALD. No. 18,798.
WOLLSTEIN & CO. V. MCDONALD. No. 18,801.
ROSSO FRUIT CO. V. MCDONALD. No. 18,802.
MID-WEST ELECTRIC CO. V. MCDONALD. No. 18,803.
EMERSON-BRANTINGHAM IMPLEMENT CO. V. MCDONALD. No. 18,804.
BERTSCHY GARAGE V. MCDONALD. No. 18,805.
CHICAGO LIQUOR HOUSE V. MCDONALD. No. 18,806.
BLOTCKY V. MCDONALD. No. 18,807.
CASE PLOW WORKS V. MCDONALD. No. 18,808.

FILED JANUARY 2, 1915.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

George A. Magney, Charles Haffke, Benjamin S. Baker and *John A. Rine,* for appellants.

R. M. Switzler, contra.

LETTON, J.

The point involved in each of the above entitled cases is identical with that decided in the case of *Farmers Cooperative Creamery & Supply Co. v. McDonald, ante, p.* 510. For the reasons given in that case, the judgment of the district court is

REVERSED.

IN THE MATTER OF THE APPLICATION OF JOHN I. TAMINOSIAN TO RECLAIM THE NAME OF MOHAMMED NADIR.

FILED JANUARY 2, 1915. No. 18,918.

Name, Change of. Under the statute requiring sufficient and reasonable cause for a change of name, a decree is not a matter of right, but of judicial discretion. Rev. St. 1913, ch. 53.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

John I. Taminosian, pro se.

ROSE, J.

Under a statute of this state petitioner demanded a judicial decree changing his name. Rev. St. 1913, secs. 5315-5318. From a dismissal of the proceeding, he has appealed to this court.

Such a petitioner is required, among other things, to state "the cause for which the change of petitioner's name is sought." There is no statutory duty resting on the district court to make the order demanded, except "upon being duly satisfied, by proof in open court, of the truth of the allegations set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner." Proof of proper and reasonable cause sufficient to satisfy the district court is a condition of the statutory relief. At common law a man may change his name any time, but in this state, if he desires a judicial record thereof, he must adduce evidence to satisfy the court that there is sufficient and reasonable cause for the change. In exercising the power to change names, the district court is not subject to the whims of every petitioner. According to his own statements, petitioner was baptized in a Congregational church at Antioch, Syria, by the name of Isaiah Taminosian; was admitted into the religion of Islam under the name of Mohammed Nadir, which he now desires to resume, his name having by the decree of an

Egyptian court been changed thereto from Yusuf; was banished from Constantinople, escaped from banishment, and traveled under assumed names; was a "Howling Dervish" in the Barnum & Bailey circus; was baptized in the Catholic church at Carlstadt, New Jersey, by the name of John Isaiah Taminosian; was a Volunteer of America in Chicago, as "Captain Tommy, the Turk;" and was rebaptized in the Christian church at Sterling, Illinois, under the name of John I. Taminosian. Petitioner has a wife, two daughters and one son. The wife protests against the change of her husband's name. She and her children are citizens of this state. As such they are entitled to the protection of the laws and the customs governing society. By their present names they have acquired a standing in the family, in the schools and in the community. Proper domestic relations are concerns of the state, and the district court is an arm of sovereignty. In that tribunal the rights of the mother and the children should be protected when known, though they are not parties to the proceeding. Injuries to the feelings and sensibilities of innocent women and children may result in greater suffering and damage than the fraudulent invasion of property rights. Under the statute requiring sufficient and reasonable cause for a change of name, a decree is not a matter of right, but of judicial discretion. Sufficient and reasonable cause for changing the name of petitioner has not been shown. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

Our statute (Rev. St. 1913, secs. 5315-5318) provides: "The district court shall have authority to change the names of persons, towns, villages and cities within this state. Any person desiring to change his or her name may file a petition in the district court for the county in which such person may be a resident, setting forth: First, that the petitioner has been a *bona fide* citizen of such county for at least one year prior to the filing of the petition; second, the cause for which the change of petitioner's name is sought; third, the name asked for. And

it shall be the duty of the district court at any term thereof after the filing of said petition upon being duly satisfied, by proof in open court, of the truth of the allegations set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner, and that thirty days' previous notice of the intended application had been duly given in some newspaper printed in such county, or in case no newspaper be printed in the county, then in some newspaper in general circulation therein, to order and direct a change of name of such petitioner, and that an order for the purpose be made in the journals of the court." The following sections provide for the change of names of towns and for the payment of costs of the proceedings, with a proviso that "any change of names under the provisions of this chapter shall not in any manner affect or alter any right of action, legal process, or property." It will be noticed that the proceedings contemplated by the statute are simple. The only traversable allegation required in the petition is that the petitioner has been a *bona fide* citizen of the county for at least one year. The petition must also allege the name asked for and "the cause for which the change of petitioner's name is sought." Of course, no issue can be tendered on these two allegations.

Formerly the given name, the name in which one is christened, sometimes in Christian countries called the Christian name, was regarded as the real name of the individual. Now custom gives one the family name of his father, and such prænomina as his parents choose to put before it. *Laflin & Rand Co. v. Steytler,* 146 Pa. St. 434. Custom also gives the wife the surname of her husband, but not his given or Christian name. "This person's real and legal name, therefore, was Mrs. Lucy Rogers and not Mrs. Wm. Rogers." *Uihlein v. Gladieux,* 74 Ohio St. 232, 247. This court seems to have stated this rule. *Carrall v. State,* 53 Neb. 431. At the common law a man might adopt any name he chose. In the states that have statutes like ours, providing for change of name, it has generally been held that statutes providing for the change of names

by judicial proceedings do not destroy the right to effect such change by the common law method. *Smith v. United States Casualty Co.,* 197 N. Y. 420. This was the only question considered in that case, and it is quite fully discussed. The opinion quotes with approval from *Laflin & Rand Co. v. Steytler, supra,* as follows: "A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father and such prænomina as his parents choose to put before it, and appropriate circumstances may require Sr. or Jr. as a further constituent part, but all this is only a general rule, from which the individual may depart, if he chooses. The legislature, in 1852, provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name." This court has decided that "the name which a man 'always went by' which he declares is his name in his dying declaration, and by which his own mother knew him, may be deemed his right name, although one witness has testified that it was not 'his right name.'" *Binfield v. State,* 15 Neb. 484.

What, then, is the "proper and reasonable cause for changing the name of the petitioner" which must appear by "proof in open court" to the satisfaction of the judge? It is generally held (see authorities cited above) that such statutes are "in affirmance and aid of the common law," and the purpose of the statute is "to make a definite point of time at which a change shall take effect. But without the aid of that statute a man may change his name or names, first or last." If, at the time of the application, the applicant's situation and circumstances are such as to make it appear that he seeks to change his name for some unlawful purpose, to assist him in the perpetration of some fraud or injustice, the application might be refused.

The change of the husband's name does not necessarily change the name of his wife. See an article on this question in 18 Law Notes, p. 164, in which a case in the California court of appeals is cited, and other cases. The article concludes facetiously as follows: "In view of all the foregoing, it would seem that our legal neophyte in California should have an unimpeachable right to take the name of Smith, although her husband's name is White. Abstractly considered, there does not appear to be much choice between the two names. White and Smith: What should be in that Smith? Why should that name be sounded more than White? Write them together, White is as fair a name; sound them, it doth become the mouth as well; weigh them, it is as heavy; conjure with them, White will get a verdict as quick as Smith. All irrelevant and immaterial. Mrs. White has chosen to be Mrs. Smith, and that the name of Smith shall bear the honors of her future forensic triumphs. And Smith let it be, say we." In the case at bar there is and can be no party named except the petitioner himself. No one is supposed to join issue with him. The majority opinion assumes that the wife and children are specially interested. If so, there should be a provision for making them parties, or at least for allowing them to appear and defend.

The petitioner, for reasons of his own, which are not forbidden by our law, desires to have a record of his change of name fixing a definite time when that change shall take place. This is all he asks of the court, and I think that the statute is intended for that purpose.

BARNES and HAMER, JJ., concur in this dissent.

CUSHMAN MOTOR WORKS, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED JANUARY 2, 1915. No. 17,855.

1. **Municipal Corporations:** DUTIES: OBSTRUCTIONS IN STREETS. Every municipal corporation is bound to use reasonable diligence to keep its streets free from obstruction. This duty cannot be evaded, suspended or cast upon another by any act of the municipal corporation.
2. ———: OBSTRUCTIONS IN STREETS: CONSTRUCTION OF RAILROAD: LIABILITY. Where a city grants to a railroad company the right to construct its road through the city and over and along its public streets, and such railroad company negligently constructs its roadbed and embankment in such manner as to obstruct the streets, or negligently fails to construct suitable and sufficient ditches, drains and culverts, made necessary by the construction of its road, to protect adjacent property from flood waters which should reasonably be anticipated, the city is liable to the same extent as if the negligent acts of the railroad company had been performed or omitted by its own servants; and the fact that the city in its grant to the railroad company provides that the railroad company shall hold the city harmless from all damages arising from the grant, and shall make all drainage that might be necessary by reason of the construction of its road and tracks, does not relieve the city from its liability; and one who, without fault or negligence on his part, suffers injury therefrom may recover from the city or the railroad company separately, or from both jointly.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed.*

Burr, Greene & Greene, for appellant.

Fred C. Foster and *D. H. McClenahan, contra.*

FAWCETT, J.

This action was instituted in the district court for Lancaster county, to recover damages alleged to have been caused to plaintiff's property by the flood waters of Antelope creek, on May 17, 1909, and August 29, 1910. From a verdict and judgment for defendant, plaintiff appeals.

It is alleged in the petition that the waters from these floods were dammed up and caused to flow over and upon plaintiff's shop near Twenty-first and N streets, in the city of Lincoln, by the negligent construction of the conduits on O and N streets, and the construction of the bridge, roadbed and embankment of the Chicago, Rock Island & Pacific Railway Company across Antelope creek in defendant city, all of which, it was alleged, caused the flood waters to overflow the banks of the creek and flood plaintiff's shop. The answer of defendant admits that it is a city of the second class, denies that it was negligent in the construction of its conduits, and alleges: That, if plaintiff was damaged, such damage was sustained by reason of its own negligence; that Antelope creek "has an extremely winding course, through a broad valley, flowing from the south and east; that the Chicago, Rock Island & Pacific Railway Company's right of way and railroad tracks cross said Antelope creek at different places, at which places said railroad company constructed and maintained railroad bridges, and at various places said right of way and railroad tracks run parallel with said Antelope channel; that said company has on each side of its right of way a ditch for drainage purposes, which extends to the Antelope creek and connects therewith at said bridges and other places along said right of way; that the grade or elevation of said railroad right of way, tracks and bed slopes to the northwest and decreases in elevation as it reaches and passes plaintiff's property, and that, on account of said bridges, ditches and cuts so made by said railroad company's connection with the Antelope creek, water was allowed to escape from the channel of the Antelope creek down said railroad company's tracks, thereby preventing said water from escaping by way of said Antelope channel, over which acts of said railroad company this defendant city had no control or authority whatever, nor did it contribute in any manner to the diverting or backing up of water by said railroad company or in flooding plaintiff's premises, and the said acts were the sole carelessness and negligence of said railroad company, and

not of this defendant city; that by reason of said fact, and the facts as hereinbefore alleged, plaintiff's premises are so located that they were flooded long before the said arches and conduits on N street were running full of water, and long before the banks of the Antelope channel were filled."

These allegations in defendant's answer amount to an admission that plaintiff's damage was caused by the negligent construction by the railroad company of its bridges, ditches and cuts, which prevented "said water from escaping by way of said Antelope channel." Defendant seeks to shield itself from liability by reason of the negligent construction of these bridges, ditches and cuts by alleging that the defendant city had no control or authority whatever over the railroad company or over its negligent acts. The trial court took this view of the law and instructed the jury as follows: "And you are instructed that, if you believe from the evidence that any flooding or injury done to the plaintiff was caused by the negligent construction of the said Rock Island Railway bridge, that would be negligence for which the city of Lincoln would be in nowise to blame, and could not be held responsible for in this lawsuit. You should consider the evidence as it may bear upon the question whether or not the plaintiff would have been flooded, but for such Rock Island Railway bridge, and, if so, to what extent." The giving of this instruction is prejudicial error for which the judgment must be reversed. Section 129, subd. LXI, art. I, ch. 13, Comp. St. 1909, in force at the time plaintiff received its damage, gave the city the power to regulate railroad crossings and do a number of other things, among which are: "To compel railways to conform tracks to grades at any time established, and if lengthwise in a public way to keep them level with street surface; to compel railways to keep streets open, construct and keep in repair ditches, drains, sewers and culverts along or under their right of way or tracks, and lay and maintain paving of their whole right of way on paved streets." In the light of this statute it was the duty of the city, when it per-

mitted the railroad company to pass over its streets and through the city, to see that it did "construct and keep in repair ditches, drains, sewers and culverts along or under their right of way or tracks." This language of the statute, of course, means to construct and keep in repair suitable and sufficient ditches, drains, culverts, etc. If the railroad company failed to construct sufficient drains, ditches and culverts, it was the duty of the city to compel it to do so, and a failure to perform that duty was negligence on the part of the city. It alone had the power to compel the company to do these things. Plaintiff could not do it. The city could not enact an ordinance which permitted the railroad company to pass through the city and over its public streets, and thereby shift from its shoulders to the shoulders of the railroad company the duty which the city owed property owners in the vicinity of its grant. That the city recognized this fact is shown by the provisions in its several ordinances under which this railroad company was given the right to run its road through the city. See its ordinances passed March 29, 1892, April 12, 1892, June 7, 1892, July 12, 1892, August 16, 1892, and other ordinances passed in relation to this matter, appearing at pages 443 to 448, both inclusive, in its "General Revised and Consolidated Ordinances and Special Ordinances of Lincoln, Nebraska. Published by Authority of the Mayor and City Council 1908." In those ordinances it is provided: "That said company shall hold the city of Lincoln harmless from all damages arising from this grant." And: "That said railway company will make all drainage that may be necessary by reason of the construction of its road and tracks and by closing of said streets and alleys: And provided further, that by the acceptance of the rights and privileges hereby granted, the said railway company agrees to save and keep the said city of Lincoln harmless from the payment of any costs, damages, or expenses, growing out of the exercise of the rights hereby conferred and granted, in favor of any person whomsoever." It will be seen from an examination of these ordinances that the city then recognized the fact

that in granting these privileges to the railroad company it was not relieving itself of the duties and obligations resting upon it to protect property owners from damage by reason of defective drainage, sewerage, etc., in the railroad company's work, and so it contracted with the railroad company that, in the event the city should be required to answer for damages to property owners by reason of the failure of the railroad company to properly construct its railroad, the city could compel the railroad company to reimburse it for such damage. It being alleged in defendant's answer, as well as shown by the evidence, that the negligent construction of the railroad company's railroad was responsible for, or at least contributed to, plaintiff's damage, the instruction above set out should not have been given. By that instruction one of plaintiff's material grounds of complaint was withdrawn from the jury. If the city, upon a full submission of all the material charges of negligence in the petition, is finally held liable on account of negligence on the part of the railroad company, as alleged, it can recoup its loss by requiring the company to make reimbursement in accordance with the terms of its grant. *Omaha Gas Co. v. City of South Omaha,* 71 Neb. 115. On the point that the city could not shift its responsibility to the railroad company, see *Russell v. Inhabitants of the Town of Columbia,* 74 Mo. 480, in which it is held: "A gas company, empowered by law to lay its gas pipes through the streets of a city with the consent of the city authorities, obtained such consent, agreeing on its part to leave the streets in good condition and not to allow the ditches it might dig to be left open longer than should be necessary to lay or repair the pipes. In the prosecution of its work the company opened a ditch in one of the streets, which, for want of pipe, was left open for several days. Whilst so exposed, plaintiff, passing at night, fell in and was hurt. Held, that the city, having given the company permission to occupy the street, was liable to the same extent as if the ditch had been opened by its own servants, i. e., without proof of notice; that the fact that the city had obtained from the

company an agreement for securing the safety of the streets did not do away with the city's liability, and that the plaintiff, if free from fault or negligence on her part, might recover for the injuries sustained, though she knew of the existence of the ditch when she went into the street."

In the light of the clear error above pointed out, we deem it unnecessary to consider any of the other points presented and discussed by counsel for plaintiff. The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

LETTON, J., not sitting.

BARNES, J., dissenting.

I am unable to concur in the majority opinion. The testimony in this case clearly shows that the Chicago, Rock Island & Pacific Railway Company had constructed a bridge across Antelope creek several blocks to the south and east of the plaintiff's premises; that the bridge was so constructed that the current of the creek flowed against the west abutment thereof; that it was so constructed as to properly carry off all ordinary flood water. It appears, however, that, when the floods came down the valley of Antelope creek, the height of the water was so great that it broke over the dike on the west and south side of the bridge, and a large part of the floods flowed down on the southwest side of the track along the ditches and borrow pits until it reached a point near plaintiff's premises, where that part of the flood was augmented by the waters which flowed north and east from Sixteenth street in said city, and that the flood waters then broke over the Rock Island tracks in an immense volume, and flowed into the plaintiff's shops to the depth of about three feet; that such condition existed for a considerable time before the conduits under O and N streets were filled up, and before the waters overflowed the channel of Antelope creek.

The defendant also introduced testimony which showed that, when the flood of May 17, 1909, occurred, there was

an unusual and excessive rainfall, which amounted to about 4.7 of an inch within a very short time, and, when the flood waters came down the Antelope creek valley from the south, there was a wall of water, which the witnesses described as something over 3 feet in height, which covered the whole valley. Defendant's testimony also showed that, when the flood of August 29, 1910, occurred, there was a rainfall of something over 8 inches over the area drained by the Antelope creek, and that the floods in question were the greatest and highest ever known to occur in the Antelope valley within the memory and experience of the oldest inhabitants of the city. The evidence shows that the railroad bridge above mentioned was not erected on any street, highway or public ground of the city, but was constructed on private property purchased or condemned by the Rock Island Railway Company, and was erected under the supervision of the sanitary drainage district. The city, therefore, had no jurisdiction over the matter, and should not be held liable for the negligent construction of the bridge, if such construction was negligent.

In constructing and operating the railroad, the company was acting for itself, and not for the city. It was no more the city's agent than is an individual licensed by ordinance or resolution to engage in some legitimate private business requiring such license or authority. If the railroad company disobeyed the law, or was negligent in building or operating its road, the city was no more responsible therefor than it would be for the tort of a private individual in the pursuit of his business. *City of Denver v. Bayer,* 7 Colo. 113; *Bancroft v. City of San Diego,* 120 Cal. 432; *Murphy v. City of Chicago,* 29 Ill. 279; *Purinton v. Somerset,* 174 Mass. 556. The evidence on this question alone was sufficient to authorize the jury to return a verdict for the defendant.

Again, the jury were correctly instructed that, if the floods of which the plaintiff complained, were caused by such unusual and extraordinary rainfalls as amounted in law to an act of God, then they should find for the defend-

ant. As I view the evidence in this case, it was not only amply sufficient, but as a matter of fact required the jury to return a verdict in favor of the city.

For the foregoing reasons, I am of opinion that the judgment of the district court should be affirmed.

HAMER, J., concurs in this dissent.

JAMES USHER, APPELLEE, V. AMERICAN SMELTING & REFINING COMPANY, APPELLANT.

FILED JANUARY 2, 1915. No. 17,896.

1. **Master and Servant:** INJURY TO SERVANT: DEFECTIVE MACHINERY: ASSUMPTION OF RISK. It is the settled rule in this state that where a servant, in obedience to the requirements of his master, uses and operates machinery which, though defective, is not of such dangerous character that it may not with reasonable probability be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury resulting from the master's negligence.
2. **Appeal:** INSTRUCTIONS. An instruction containing an inaccurate explanation of terms correctly used therein will not require a reversal of the judgment, unless it appears that such inaccuracy probably caused the instruction to mislead the jury.
3. **Instructions** requested by defendant, and referred to in the opinion, *held* properly refused.
4. **Master and Servant:** INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE. The evidence examined, and set out in the opinion, *held* sufficient to require the submission of the case to the jury and to sustain the verdict rendered thereon.
5. ———: ———: TRIAL: VERDICT: INCONSISTENCY. In an action for personal injuries by a servant against his master and its foreman jointly, where the principal negligence alleged is that of the master alone, a verdict in favor of the foreman and against the master will not be set aside on the ground that it is inconsistent, unless it is made to appear that plaintiff would not have received the injury for which he seeks to recover but for the negligence of the foreman.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

James O'Hara, James C. Kinsler and *Crofoot & Scott, contra.*

FAWCETT, J.

Action in the district court for Douglas county for personal injuries. Verdict and judgment in favor of defendant Wolfe and against defendant American Smelting & Refining Company, from which it appeals. Defendant Wolfe not being a party in this court, the singular number will be used in referring to the appealing defendant.

The second amended petition, upon which the case was tried, alleges substantially: That the defendant corporation was at the time complained of operating its smelting and refining plant in the city of Omaha, and, that defendant Wolfe was its foreman or superintendent; that plaintiff "was employed by the defendant corporation as a motorman, and was required by the defendants to operate a certain electrical motor car furnished and used by the defendant corporation for the purpose of moving ores and metals from one part to another of its said smelting plant;" that the car was defectively, dangerously and negligently constructed, and that it was an unsafe and dangerous place in which to perform the work required of plaintiff. It then describes the construction of the car, its defective condition from use, and the manner in which the electric current used to operate it passed from an overhead trolley wire through an uninsulated iron trolley down to and through the motor of the car, the manner in which the trolley was attached to the floor of the car, and the close proximity of the point where it was attached to the place where plaintiff was required to sit while operating the car; and alleges that the accident was caused by the defective condition of the car, and that his injuries resulted from its dangerous construction.

The defendant answered, admitting its corporate capacity, the business in which it was engaged, that defendant Wolfe was a foreman, and that plaintiff was employed in operating the motor car, all at the time of the accident; denies every other allegation in the petition; pleads, in detail, contributory negligence and assumption of risk, and alleges that the car and its appliances and equipment were reasonably safe and fit for the purpose for which they were designed and used, and were those generally and commonly used in the business in and about which plaintiff was employed. It then pleads an alleged settlement; but, as nothing on that account is claimed in its brief here, that portion of the answer need not be referred to. The reply denies and explains specifically the several acts of contributory negligence alleged in defendant's answer; alleges that prior to the date when he was injured he called the attention of defendant Wolfe and of the defendant corporation to the fact that the brake shoes were worn too thin to hold the car in going down grade, but defendants assured him that the car was safe, and that he could go on and use it with safety; that he relied upon the assurances that the car could be safely used, and continued to use it until he received the injuries complained of; that, when he was struck by the iron arm projecting from the trolley pole, he received an electrical shock of 250 volts pressure, which came through the uninsulated trolley pole and iron arm projecting therefrom.

As we view the case, the material assignments of error are: Insufficiency of the evidence; whether or not defendant assumed the risk; whether, under the pleadings and evidence, the defendants are so joined that the verdict against the appealing defendant is so inconsistent with the verdict in favor of its codefendant that it cannot be sustained; and the rulings upon the instructions.

We shall not attempt to set out the evidence *in extenso*, nor attempt to discuss the weight of the evidence offered by defendant in opposition to that offered by plaintiff, but will go into it only far enough to discover whether or not there was sufficient evidence to take the case to the jury.

If so, then that question must be considered settled. The evidence shows that in its smelting plant defendant was using two cars for moving ores and metals to and from different places in its large plant; that one car, which plaintiff says he used most of the time, had a cupola over it from which the trolley pole extended upward to the trolley wire. It will be seen at a glance that with this kind of a car the accident which happened to plaintiff could never have occurred. The car which plaintiff was using at the time of his injury was a metal car without, so far as the evidence shows, any wood in its construction. The floor of the car was metal, the seat, provided for the operator to use while operating the car, was metal. The trolley pole and the arm extending therefrom and the coil spring were all metal. There was no insulation anywhere about the car—not even a wooden seat for the operator to sit upon, or a wooden platform on which to rest his feet. The trolley pole, made of a piece of iron gas pipe, was fastened to the metal floor of the car upon a metal base about two feet high, which base was within the distance of about two feet from where the operator was required to sit. It seems to us that defendant was chargeable with notice of the fact that in putting such a car in use in its plant it was exposing its employee, who should be called upon to operate it, to serious danger whenever an accident might occur which would cause the disarrangement of the connection of the car with the overhead wire carrying the electric current. It also knew that the brake appliances required for the control of the car when running down the grade, which was so steep that there was a drop of 9 in 150 feet, were so defective that they would not control the car. When the attention of defendant's foreman was called to this condition of the car, he made no promise of repair, but told plaintiff that he could control the car by reversing the electric current. The foreman, while upon the witness-stand at the trial, still insisted that such was the fact. He testified that the car could be controlled by reversing the electric current, even if there had been no brakes at

all upon it. He also insisted, while upon the witness-stand, that the car was a perfectly safe appliance for the purpose for which it was being used, and the only fact claimed as negligence on the part of the plaintiff was that, after he had made his trip up the grade referred to, and deposited his load, he started back down the grade without reversing his trolley pole. The foreman testified that, in running, the trolley pole should always slope upward to the rear so that it would "trail," but that, when plaintiff came down the grade at the time of the accident, his trolley pole was extending upward toward the front; that it was plaintiff's duty, when he had deposited his load, before returning to reverse the trolley and have it trail, going down, just as it had done going up. He admits, however, on cross-examination that he had frequently seen the men going down the grade without reversing the trolley. Plaintiff testified that at one time during his employment the trolley could have been reversed at the top of the grade before returning, as there was plenty of room to get around the car and swing the trolley around, but that by reason of building some walls around the furnaces, and on account of a switch engine knocking out a bridge that at one time stood there, there was thereafter not room enough to get around and turn the trolley. In this he is somewhat corroborated by one witness for the defendant, who testified that he had seen the trolley pole turned at the top of the incline, but that it might have been when the bridge was there. That the car was not a safe appliance is shown by the fact that, notwithstanding plaintiff applied both the brakes and the current, as he testified, yet the car did run away and the accident did occur.

It is contended that there is no evidence that plaintiff received any electric current in his body, and hence he suffered no damage beyond the mere blow upon his cheek by the arm extending from the pole. We think the evidence is ample to take the case to the jury on that point. Plaintiff, who since the injury has taken a course in electricity, fitting himself for an electrical engineer, testifies unqualifiedly that he did receive the electric current in and

through his body by coming in contact with the trolley or the metal arm extending from it. At least one physician who examined him testified that, no other cause being apparent for the condition in which he found plaintiff, he must assume that his weakened condition was the result of having received the electric shock complained of. It is said that, if he had received this shock at the time his cheek came in contact with the metal arm, a burn would have been discernible; but the evidence shows that that is not always true. So that from any view-point it seems to us there was sufficient evidence to go to the jury on the question of defendant's negligence as to the character of the appliance, as to the place where plaintiff was required to work, and as to his having received the injury complained of, without fault on his part.

This brings us to the question of assumption of risk. It is contended that plaintiff knew the condition of the car both as to its imperfect brake shoes and the uninsulated character of all of its parts, and that by continuing in his employment without any promise of alteration or repairs he assumed the risk and cannot recover. The question of continuing without promise of repairs is not within the issues, nor claimed by plaintiff in his testimony. We think this point is controlled by *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, and the cases decided subsequently thereto, based upon and approving that case. The *Finlayson* case was expressly followed in *Lee v. Smart,* 45 Neb. 318, *Dehning v. Detroit Bridge & Iron Works,* 46 Neb. 556, and *Sapp v. Christie Bros.,* 79 Neb. 701. In *Dehning v. Detroit Bridge & Iron Works, supra,* the second and third paragraphs of the syllabus are as follows: "(2) An employee assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards.

"(3) The above rule has been modified in this state as follows: 'Where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence.' *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578; *Lee v. Smart,* 45 Neb. 318."

While the three cases last above cited are based upon the rule announced in paragraph 5 of the syllabus in the *Finlayson* case, there is an inaccuracy in their statement of the rule there announced. In the *Finlayson* case the language used in the latter part of the syllabus is: "And the employee, in obedience to the requirements of the employer, uses and operates such dangerous machinery carefully and skilfully, believing there is no immediate danger, and when it is reasonably probable it can be safely operated with such care, the employee does not assume the risk." This statement is accurate and consistent. The inaccuracy in quoting the syllabus in the later cases consists in omitting the language that where the employee uses such dangerous machinery when it "is reasonably probable" it can be safely operated with such care. The inaccuracy pointed out does not, however, show any inclination on the part of the court to depart from the rule as announced in the *Finlayson* case. So that, from the decision in that case, in 1884, to *Sapp v. Christie Bros.,* in 1907, the modification to which attention is called in the *Dehning* case may be said to have been the unbroken rule in this state. We are not willing to recede from it now. As said in *Thomsen v. Jobst,* 93 Neb. 375: "It is difficult to perceive how these former cases can be distinguished from the case at bar. If the defendant is not allowed to assert assumption of risk or contributory negligence because he has promised to remedy the defect in the dangerous implement, and so induces the plaintiff to continue its use, why should he be allowed to rely upon such defenses when he has insisted that the plaintiff shall continue

to use the dangerous implement, and has induced him to do so by a threat of this nature, and not only that, but has stood by and directed him in the dangerous use of the implement." While in some of the former cases there was a promise of repair, in the case at bar there was an assurance of safety, viz., that the car could be controlled by reversing the electric current. Plaintiff relied upon this assurance and continued to use the car, as "directed" by the foreman. That he neither assumed the risk nor was guilty of contributory negligence in so doing is amply sustained by the case above cited, and by *Anderson v. Pitt Iron Mining Co.*, 103 Minn. 252; *Hunley v. Patterson & Co.*, 116 La. 736, 41 So. 54; *Galveston, H. & S. A. R. Co. v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467; *Alabama Consolidated C. & I. Co. v. Heald*, 171 Ala. 263. We think the rule announced aptly fits the case at bar. According to plaintiff's testimony the car he was called upon to use was defective and in a sense dangerous, but he was assured by his employer that, notwithstanding its defective condition, it could be used with safety. He continued to use it safely for about another month, and then, while using it with reasonable skill and caution, he received the injury complained of. We therefore hold that in so doing he did not, as a matter of law, assume the risk of injury from the accident which resulted from the master's negligence.

Instruction No. 6, given by the court, which was complained of, is as follows: "The plaintiff, while in the employ of defendant company, assumed all the risks of injury that were ordinarily incident to the employment in which he was engaged; and he also assumed the risk incident to the use of defective appliances, provided such defects were open and obvious, and plaintiff knew, or by the exercise of reasonable care should have known and appreciated, the danger incident to the use of such defective appliances; and, if you believe from the evidence that his injuries, if any he received, grew out of a risk that was ordinarily incident to his employment, or were the result of defects which were open and obvious, and that plaintiff knew and

appreciated, or by the exercise of reasonable care should have known and appreciated, the danger of using and operating the car, then your verdict should be for defendants. By the use of the expression 'risk ordinarily incident to the employment' and 'defects open and obvious' is meant a risk of injury that does not arise or grow out of any act of negligence on the part of defendants. The employee does not assume a risk created by any act of negligence of an employer."

While this explanation of the two terms quoted is not strictly accurate nor exactly within the rule announced in the *Finlayson* and other cases cited, it is not so inaccurate or erroneous, when taken in connection with the main part of the instruction, as to warrant us in holding that it was prejudicially erroneous.

Instruction No. 1, requested by defendant, was properly refused. It did not respond to either the pleadings or the evidence, but is based upon a case where there has been a promise to repair a defective appliance, which promise was not kept. Instruction No. 2 would have told the jury that the defendants were not required to furnish plaintiff the newest or safest motor car and machinery and appliances for the performance of the work in which he was engaged; that if the car and its appliances were reasonably safe and fit for the performance of the work, and if the plaintiff in the execution of his work "could have used such car and appliances and equipment with reasonable safety to himself by the exercise of ordinary care on his part, then the defendants are not liable." This instruction would completely nullify the rule laid down in the *Finlayson* case. It was properly refused. Instruction No. 3 contains the same vice as instruction No. 1, already referred to, and was properly refused. By instruction No. 4 the court was asked to tell the jury that, if they found the car and its appliances and equipment were reasonably safe for the work in which plaintiff was engaged, and were those commonly and generally used for such work and were not defective, then the plaintiff cannot recover. In announcing the rule which defendant was seeking to

invoke by this instruction, the courts never intended to hold that appliances in common and general use for certain work applied where such appliances were defective. The use of the very best known appliances will not protect a master if they are permitted to become so defective that they will no longer safely do the work for which they are being used. The evidence shows that there was no general system of inspection of the cars or other appliances used in this plant, but that they were only repaired when something went wrong with them. Even then it was not done in this case.

This brings us to the only remaining question: Whether, under the pleadings and evidence, the defendants are so joined that the verdict against the appealing defendant is so inconsistent with the verdict in favor of its codefendant that it cannot be permitted to stand, but that defendant is entitled to a like judgment as was entered in favor of its codefendant. This is not a case where the appealing defendant could not be guilty of the negligence charged unless its foreman was also guilty. If the pleadings and evidence showed that the negligence of the foreman alone was the proximate cause of the injury, and that plaintiff could not have been so injured but for the negligence of the foreman, there might be some grounds for the contention; as where a locomotive engine runs over a person and kills him, and the railroad company and engineer are proceeded against jointly for the damage, and the charge of negligence is that the engineer recklessly and negligently ran his engine over the deceased. There are authorities which hold that in such a case a verdict releasing the engineer would release the company, for the reason that the only act of negligence alleged against either was the negligent act of the engineer himself. But here the principal negligence alleged was that of the defendant company in furnishing a defective and unsafe appliance for use by its employee and an unsafe place for the employee to do the work. This was purely the negligence of the master and not the negligence of its foreman. Even if the foreman had told plaintiff to run the car, this would not have amounted

to more than a concurrent act of negligence on the part of the foreman, and the rule, we think, is well settled that an injury to one by the joint agency or cooperation of several persons, or done contemporaneously by them, even though without concert, renders them liable jointly and severally; and the mere fact that, in an action where several persons are proceeded against jointly for a wrong, one of the joint tort-feasors is released will not release the others, and the verdict against them will be sustained. 1 Cooley, Torts (3d ed.) sec. *166, p. 247; *Walton, Witten & Graham v. Miller's Adm'x*, 109 Va. 210; *Cleveland, C. C. & St. L. R. Co. v. Hilligoss*, 171 Ind. 417; *Cuddy v. Horn*, 46 Mich. 596; *Flaherty v. Minneapolis & St. L. R. Co.*, 39 Minn. 328; *Corey v. Havener*, 182 Mass. 250.

Upon consideration of the whole record, we are unable to discover prejudicial error. The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

CORN EXCHANGE NATIONAL BANK, APPELLEE, V. OCHLARE ORCHARDS COMPANY; HENRY G. HARTE ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,835.

1. **Trial:** INSTRUCTIONS: ISSUES. When the trial court instructs the jury as to what issues are submitted for their determination, it is not required that the court should tell the jury the reason for so limiting the issue.
2. **Evidence:** CONTENTS OF WRITTEN INSTRUMENT. It is not competent to prove by a witness on the stand the contents of a paper which he holds in his hands while testifying.
3. **Witnesses:** IMPEACHMENT. It is not competent to question a witness as to immaterial matters for the purpose of laying a foundation for impeachment.
4. **Trial:** MISCONDUCT OF JURY. A juror must not state to his fellow jurors material facts not in evidence but within his personal

knowledge. If a juror states in the jury room that he is expert in matters of handwriting and can determine a disputed fact from an inspection of papers in evidence or declares that a party to the suit is liable because of some fact proved that would not, as matter of law, justify such finding, this does not constitute such misconduct of the jury as requires a reversal. Assertions of opinion and boasting of ability or expert knowledge are said to "inhere in verdicts," and the law will not regard such matters as misconduct.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

T. W. Blackburn, for appellants.

Smyth, Smith & Schall, contra.

SEDGWICK, J.

The Ochlare Orchards Company executed and delivered its four promissory notes to four several parties, one of them being to one Cummings. The note to Cummings was indorsed by the defendants Henry G. Harte and John H. Harte, and also by Mr. Cummings. Mr. Cummings sold the note to the plaintiff bank, and afterwards the bank brought this action thereon against the company and the three indorsers in the district court for Douglas county. Cummings was not served with process. The action proceeded against the other defendants, and resulted in a verdict and judgment for the plaintiff. The defendants Henry G. Harte and John H. Harte have appealed.

When the note was offered in evidence, there appeared on the back thereof, over the signatures of the appellants, the following indorsement: "Notice of nonpayment and protest and demand for payment is hereby waived by the indorsers hereof." The defense was that the defendants were not notified of the dishonor of the paper as the law merchant requires, and that the above quoted waiver of such notice was not on the paper when these defendants indorsed the same, but was placed thereon afterwards without the knowledge or consent of these defendants. The sole issue of fact to be submitted to the jury was whether

the waiver of notice was placed upon the paper before or after the indorsement by these defendants. These defendants testified positively that the waiver of notice was not on the paper when they indorsed the same. Several witnesses testified as positively that it was. If the issue was properly tried and submitted to the jury their verdict must be conclusive.

The court did not say to the jury that the defendants claimed that they were guarantors only, but it was not necessary to tell them why the time of indorsing this waiver was material. It was sufficient to tell them that their verdict must depend upon that question.

As these four notes were given at the same time, and for the same purpose of providing money for the company, and the respective parties who took them sustained the same relation to the company, the fact, if it was a fact, that the other three notes had no indorsement of waiver of notice, although not directly controlling, might tend to support the contention of these defendants that the companion note in question was not so indorsed when signed by them. A witness on the stand held one of these other notes in his hand while testifying, and was not allowed by the court to state to the jury what indorsements were or were not upon the back of the note which he so held. The court was, of course, right in this. There was no reason for withholding the note itself, which was the best, and, under the circumstances, the only competent, evidence of its contents. The other notes not being in evidence, there was no competent evidence that they were not indorsed with the same waiver of notice. It was therefore not material that the stenographer, who testified that she wrote the waiver on the note in suit before these defendants indorsed the same, had stated out of court that she also wrote the same on the other notes. There was no offer of competent proof that the other notes were not also indorsed with the same waiver of notice.

That some of the jurors argued in the jury room that these defendants would be liable as indorsers, even if the waiver was not upon the note when indorsed by them, and

that some also stated that they had experience in handwriting and could tell from an inspection of the indorsements on the note that the signatures of these defendants were placed thereon after the waiver of notice, would not be such misconduct as to require a reversal. These jurors were not assuming to state evidence of facts within their personal knowledge. They were stating their opinions derived from the facts in evidence, and fortifying those opinions by showing their ability to judge such matters. Such opinions and discussions of jurors are matters that inhere in the verdict, and no prejudicial error can be predicated thereon. It is not necessary to examine the record to ascertain whether these affidavits of the jurors are properly preserved in the record.

This note was negotiated upon the strength of the indorsement of these defendants. It has not been paid. The defense that they were not notified of its dishonor is technical under the law merchant. The question whether they waived such notice was fairly submitted to the jury.

The judgment of the district court is right, and is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

PAUL NICKEL, APPELLEE, V. ROBERT BUTKE, APPELLANT.

FILED JANUARY 2, 1915. No. 17,869.

Master and Servant: INJURY TO SERVANT: EVIDENCE. The judgment is reversed because, under the facts in evidence, the plaintiff has no cause of action against this defendant.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Smyth, Smith & Schall, contra.

SEDGWICK, J.

This is an action to recover personal injuries claimed to have been received through the negligence of defendant in furnishing a defective gasoline engine, which the plaintiff was employed to operate. Judgment for plaintiff, defendant appeals.

The petition charged the defects in the engine to be that the cylinder was not properly packed, and that the timer to the engine was not properly placed or secured. It is alleged that the plaintiff was informed by the defendant before he began work that the engine was in good running order; that he relied upon this statement, and, in attempting to start the engine in the usual and ordinary way, the engine started suddenly, causing his foot to slip in such a position that it became crushed and necessitated the amputation of a toe. The answer admits that plaintiff was employed to run a gasoline hoisting engine, and that he was injured while in the defendant's employment. It also pleads assumption of risk, contributory negligence, and makes a general denial of all other allegations not admitted.

It appears from the evidence that a gasoline engine, especially one with one cylinder, is dangerous and uncertain. It is very important that one who assumes to run one of them is familiar with the job and has had experience in regard to how they act. The plaintiff was employed as one having had such experience. He represented that he had been engaged in running gasoline engines for four years. The defendant was not familiar with gasoline engines. He did not examine it himself, but employed a man, who had also had experience, as the plaintiff had, to put it in order, and honestly supposed that it had been put in order. He so informed the plaintiff, and the plaintiff knew, or ought to have known, just what it means to put a gasoline engine in order. When the plaintiff attempted to start the engine, it did not act regularly, but "puffed." This was because the gas was not exploded at the right time, and that would cause it to run irregularly, with a jerk and jam, and that would be ample notice to a man who had run

a gasoline engine that, unless the gasoline was low, the timer was out of place. The plaintiff knew from the way this engine acted when he first attempted to run it that there was something wrong with the timer. He says that he examined the engine. He looked at the timer and saw that it was in place; but, as he had run a gasoline engine, he must have known that he might find the timer in place, and the moment gas was exploded in the cylinder, if the timer was loose, as he now says it was, it would be thrown out of place, and he ought to have known at once that this was the condition here. Nothing else could possibly cause it to act as the engine did when he attempted to start it.

Again, when the engine "puffed and jerked" when he attempted to start it, he should have known, and undoubtedly did know, that the jerks were not regular. Some of them might be very much more severe than others, and so he should have prepared himself. If he persisted in attempting to start it without further examination, he should have prepared himself for a more severe jerk than any he had yet noticed. It is suggested that the timer might have been put out of place by some meddlers while the engine stood in an exposed place. If this was the case, the plaintiff never looked at the timer to see whether it was in place or not, which, when he found that the engine was not starting regularly, was gross negligence on his part.

It is not necessary to discuss the other errors assigned. It is an unfortunate thing that the plaintiff had his toe mashed. Of course, he did not intend to hurt himself, and perhaps there should be some fund prepared from which such damages could be realized, but under the law this employer is not liable.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., dissenting.

At the time the plaintiff was employed, defendant stated to him specifically that the engine was in good running order, all he had to do was to put oil cups on and get some

gasoline, and told him to start the engine that afternoon. He relied upon this statement, and attempted to start the engine without going over it and examining all its parts. Nickel only assumed the risk which would arise from the operation of a gasoline engine which was in good running order. If he had been told to overhaul the engine and examine it before starting it, or had been told that the timer was out of place, and had then proceeded to operate it without adjustment, he would have assumed the risk.

The testimony as to the assurance to plaintiff by the defendant that the engine was in good running order is undisputed. By making this unqualified statement, we think the employer, and not the workman, who had no knowledge of the fact, took the risk that the engine had not been tampered with during the length of time it had been standing in the public street. The servant relied upon this assurance, and therefore refrained from making an examination. Having thus rested upon his employer's statement, which under these circumstances he had a right to do, he was entitled to recover if he was injured through a hidden defect. *Hedin v. Northwestern Knitting Co.*, 149 N. W. (Minn.) 541, and cases cited.

REESE, C. J., and ROSE, J., concur in this dissent.

JOHN F. REAMS, APPELLEE, V. ALBERT W. SINCLAIR, APPELLANT.

FILED JANUARY 2, 1915. No. 17,873.

1. **Judgment:** RES JUDICATA: DIRECTION OF VERDICT. In a law action, if the parties submit their case for the determination of the court upon defendant's motion to direct a verdict in his favor, a verdict so directed and judgment thereon will be *res judicata* of the issues in the case.

2. **Trial:** DIRECTION OF VERDICT: RECEPTION OF FURTHER EVIDENCE. Upon ruling in defendant's favor upon such motion, the court may in its discretion allow the plaintiff, upon his request, to introduce

further evidence, and will do so when it appears that justice requires such action.

3. **Judgment**: RES JUDICATA: DIRECTION OF VERDICT. If, upon such motion, the plaintiff makes no request to be allowed to proceed further in the case, but appeals to this court from the judgment, entered upon such verdict, he will not afterwards be allowed to litigate the issue involved in such action.

4. **Ejectment**: PLEADING AND PROOF. In an action of ejectment, the plaintiff must allege and prove a legal title and right of possession.

5. **Judgment**: RES JUDICATA: EJECTMENT. If an action in ejectment is decided for defendant because a writing relied upon by plaintiff as a conveyance in his chain of title is construed to be insufficient for that purpose, such judgment will not be a bar to a subsequent action in equity in which it is alleged and proved that the said writing transferred to the grantee named therein an equitable right to the land in question, and that such grantee duly conveyed his interest in the land to the plaintiff.

APPEAL from the district court for Franklin county: ERNEST B. PERRY, JUDGE. *Affirmed.*

W. C. Dorsey, for appellant.

Bernard McNeny and *George J. Marshall, contra.*

SEDGWICK, J.

This plaintiff began an action in ejectment against the defendant in the district court for Franklin county. When the evidence was completed, the trial court directed a verdict for the defendant. Upon appeal to this court, the judgment of the trial court was affirmed. *Reams v. Sinclair,* 88 Neb. 738. Afterwards the plaintiff began this action in equity in the district court for Franklin county to establish and quiet his title in the same land. The trial court found the issues in favor of plaintiff, and entered a decree quieting his title, and the defendant has appealed.

The defense relied upon is the former adjudication in the ejectment action. In that action, as above indicated, the parties proceeded to trial, and, when the evidence was in and the parties had rested, the court, upon the defendant's motion, directed the jury to find a verdict in the defend-

ant's favor. There is considerable discussion in the briefs and many authorities are cited upon the question whether a judgment upon an involuntary nonsuit is a bar to another action for the same cause and between the same parties. The seeming conflict in the authorities upon this point is apparently largely due to changes from the common law practice introduced by the code procedure, and also to the different provisions in the codes of the various states. Our code provisions are plain and simple, and we have not generally found difficulty in applying them. Section 7654, Rev. St. 1913, provides: "An action may be dismissed without prejudice to a future action: First, by the plaintiff, before the final submission of the case to the jury * * *; second, by the court where the plaintiff fails to appear at the trial; third, by the court for want of necessary parties; fourth, by the court on the application of some of the defendants where there are others whom the plaintiff fails to diligently prosecute; fifth, by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action the decision must be upon the merits."

If the plaintiff desires that the disposition of his case shall be without prejudice to another action, he can dismiss it "before the final submission of the case." If he persists and takes the judgment of the court on his case, it will be *res judicata* of the issues involved therein. It is said in the brief that, when the defendant moves for nonsuit and his motion is overruled, the defendant may still proceed with his case, and that the same privilege should be allowed the plaintiff. If the plaintiff asks to be allowed to introduce further evidence, the court has the discretion to allow it. *Nelson v. Omaha & C. B. Street R. Co.*, 93 Neb. 154. The trial court will generally allow this if it appears that justice requires it. But if the plaintiff does not ask to submit further proofs, and persists in standing upon the record as made, and appeals to this court from the decision against him, he cannot afterwards avoid the effect of the judgment.

The question, then, in the case at bar is whether the issues presented and tried in this case are the same as those determined in the former action. In an action of ejectment, the plaintiff must show a legal title and right of possession. In the ejectment suit, the plaintiff "traced the title from the United States to Fred Smith." He then introduced a deed of a master in chancery of an Illinois court purporting to convey title to plaintiff's grantor. This deed did not convey a legal title, because it appeared that "the proceedings in Illinois were in partition," and it was held that "partition proceedings are *in rem*." And in such proceedings the Illinois courts could not convey title to real estate in Nebraska. In the case at bar, it appears that the then owners of the land treated the Illinois proceedings as sufficient, and received full compensation for the land thereunder. This gave plaintiff's grantor an equitable title to the land, which could not be enforced in that action. This action in equity is the proper action in which to try that issue. It plainly was not tried and determined in the former action.

This being the sole question presented in this case, it follows that the judgment of the district court is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

WILLIAM MCCORMICK, APPELLEE, V. ALICE A. BROWN ET AL., APPELLEES; WILLIAM WILSON, INTERVENER, APPELLANT.

FILED JANUARY 2, 1915. No. 17,925.

1. **Fraudulent Conveyances: HOMESTEAD.** The homestead of a debtor and his family is not subject to the claims of his creditors, and fraud cannot be predicated upon the transfer of the homestead interest by the debtor to his wife.

2. **Husband and Wife: WIFE'S INTEREST IN HUSBAND'S REALTY: LIABILITY FOR HUSBAND'S DEBTS.** Under the act of 1907 (laws 1907,

ch. 49, Rev. St. 1913, secs. 1265-1272), a wife has an interest in the real estate of her husband which he cannot alienate without her consent, and is not subject to his debts.

3. **Fradulent Conveyances:** HUSBAND AND WIFE: HOMESTEAD. If the title to the homestead property is in the husband, and it is sold and conveyed by husband and wife for more than the $2,000 homestead exemption, upon the husband's agreement with his creditors to pay them out of the proceeds thereof, the fact that he transfers to his wife the amount of the homestead exemption, and of her interest under the statute in the remainder, is not a fraud against his creditors of which they can complain.

4. ———: ———: RIGHTS OF HUSBAND'S CREDITORS. In such case, if the husband fails to pay his creditors out of the proceeds of the sale, without the knowledge of the wife that he intends to or does so fail, it will not amount to fraud on the part of the wife, so as to subject her interests in the proceeds of the sale to the claims of the husband's creditors.

5. **Husband and Wife:** RIGHTS OF WIFE: LIABILITY FOR HUSBAND'S DEBTS. If, in such case, the wife in good faith repurchases the property with her shares of the proceeds of the sale, and the proceeds of a loan which she procures on the property, her title will not be subject to the claims of her husband's creditors.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Stewart, Williams & Brown, for appellant.

Burkett, Wilson & Brown and *Tibbets & Anderson, contra.*

SEDGWICK, J.

In November, 1910, the defendant John J. Brown held the title to about 20 acres of land near the corporate limits of the city of Lincoln, and he and his wife, the defendant Alice A. Brown, had lived upon the land as their homestead. At that time he sold the land to William J. Bryan for the consideration of $8,750. This consideration was paid $5,000 in cash, and two promissory notes of Mr. Bryan, one for $2,258.62 and the other for $1,491.38. Afterwards Mr. Bryan reconveyed the land to Mr. Brown, who immediately conveyed to the defendant, Alice A. Brown. The plaintiff, William McCormick, began this ac-

tion in the district court for Lancaster county against these defendants, Alice A. Brown and John J. Brown, in which action Mr. William Wilson intervened. The intervener alleged that in March, 1910, he loaned to the defendant John J. Brown $800, and took his promissory note therefor, due in six months, and that the title to the land was taken in the defendant Alice A. Brown to defraud the creditors of her husband, John J. Brown, and particularly this intervener. The issue between the plaintiff and the defendant Alice A. Brown was adjusted, and trial was had upon the petition of the intervener. The trial court found the issues in favor of the defendant Alice A. Brown, and entered a decree quieting her title. The intervener has appealed.

The defendant John J. Brown made no appearance in the action. It appears from the evidence that, at about the time of the sale and conveyance of the land to Mr. Bryan, the defendant John J. Brown, who was in some kind of business in the city of Lincoln, had failed, and his wife was aware that he was having difficulty with his creditors, so that she must have known that if he transferred to her property which was liable for his indebtedness it would operate to hinder and delay his creditors. We think, therefore, the question in this case is whether Mr. Brown did transfer to his wife property which in his hands would have been subject to the claims of his creditors. Mrs. Brown was a witness in her own behalf, and appears to have answered all questions on the direct and cross-examination without hesitation or evasion. Her knowledge in regard to the terms of some of the transactions was not as complete and accurate as we would expect in the case of an ordinary business man, but the trial court appears to have relied upon her testimony in regard to those matters that were within her knowledge, and we have observed nothing in the record that requires us to find that the court was not justified in so doing. She testified that she was married to the defendant John J. Brown something more than a year before the sale of the land to Mr. Bryan, and that at the time of her marriage her father gave her $1,000,

which was mostly expended in furniture and household articles for their home. Afterwards her father procured insurance for them on the house and furniture, amounting altogether to $3,000. The property was destroyed by fire and the insurance was paid. She says that she received $1,900 of the insurance money. There is considerable discussion in the brief as to her right to the $1,900. Mrs. Brown testified that there were two policies of insurance. She thought one of them was upon her house and the other upon the furniture and household goods, but she was not certain about this. It appears that the house and a considerable part of the furniture were included in one policy, as the property of Mr. Brown. We do not regard this as of controlling importance in the case. The real question is how much of the property really belonged to Mrs. Brown. The fact that, in making out the policy, a transaction in which she took no part, some of the household furniture that belonged to Mrs. Brown was included in the policy upon the house does not appear, under the circumstances in this case, to be inconsistent with the testimony of Mrs. Brown as to the ownership of the property. She testifies that when the property was sold to Mr. Bryan she understood from Mr. Brown that he was selling it for something over $14,000, and that Mr. Brown promised her $6,000 of the money as her "dower interest" in the property. As a matter of fact, he never gave her any of the money at all, but he transferred to her immediately after the sale of the property Mr. Bryan's promissory note, $2,258.62. She repurchased the property from Mr. Bryan. Mr. Bryan, knowing that there was some question raised as to the good faith of Mr. Brown in these transactions, declined to convey the property directly to Mrs. Brown, and insisted on returning it, at her request, to Mr. Brown from whom he received the title. This was done, and Mr. Brown immediately transferred it to Mrs. Brown. She did all of the negotiating with Mr. Bryan for a return of the property. Mr. Bryan, at her solicitation, consented to return the property for the amount that he had paid for it, with interest thereon at 6 per cent. per annum, amounting at the time to

$9,071.32. Mrs. Brown procured a loan upon the property in the sum of $4,897.80. She testified that she paid Mr. Bryan for the property by returning to him the note, $2,258.62, and giving him the check, the proceeds of the loan, $4,897.80, and a payment in cash, $1,914.90. This cash item was the amount that she had received in the settlement with the insurance companies. The intervener testified that Mr. Brown promised to pay his claim out of the proceeds of the sale to Mr. Bryan, but failed to do so. It appears that Mrs. Brown was not aware that he had failed to make such payment when she repurchased the property from Mr. Bryan. No fraud can be predicated on the conveyance to Mrs. Brown of the homestead interest of $2,000 in this property. Under the act of 1907 (laws 1907, ch. 49), which is now secs. 1265-1272, Rev. St. 1913, Mrs. Brown was entitled to a one-half interest in the real estate of her husband, which he could not will or convey away from her. *Gaster v. Estate of Gaster,* 92 Neb. 6.

The evidence indicates that the land was worth more than the amount that it was sold for to Mr. Bryan; but if we consider its value to have been $8,750, and deduct the $2,000 homestead estate, Mrs. Brown's one-half interest would be more than the amount of the note that was given her in lieu of that interest. If her personal property, for which she received insurance money, was worth $1,000, and Mr. Brown transferred to her the homestead interest, $2,000, and one-half of the value of the land after deducting that interest this would be more than Mrs. Brown received as her interest in the proceeds, and the creditors of Mr. Brown could not complain. The creditors of Mr. Brown therefore are not in a position to complain of her purchase of this property as she did.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

LETTON, J., dissenting.

I did not hear the argument in this case; but, since the doctrine announced in the second paragraph of the syl-

labus is directly opposed to the language of the statute and is of great importance, I feel it my duty to call particular attention to it by this dissent. Section 1269, Rev. St. 1913, provides: "The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage *may be barred* * * * *by the sale of such real estate under execution* or other judicial sale, during the lifetime of the owner." In *Gaster v. Estate of Gaster,* 92 Neb. 6, 14, Sedgwick, J., says, speaking of the language of this section: "It recites the right of a married man or woman in the property of his or her spouse, provides in express terms how that right may be barred, and excludes the power to bar that right by will." The holding in the present case is inconsistent with this statement. It holds, in effect, that the right of one spouse to inherit the real estate of the other can *not* "be barred * * * by the sale of such real estate under execution * * * during the lifetime of the owner." This holding affects the property interests of every creditor of a man or woman in the state who owns real estate in excess of the homestead exemption. The language of the statute is plain. It requires no construction. Formerly a sale of the wife's real estate to pay her debts barred the curtesy of the husband. *Miller v. Hanna,* 89 Neb. 224. But a sale for the husband's debts did not bar the dower right of the wife in his real estate. *Butler v. Fitzgerald,* 43 Neb. 192. The legislature by this statute changed the law, placed husband and wife on a parity in this, as in other respects, and made the real estate of either spouse, in excess of the homestead exemption, subject to sale for his or her debts.

In *Gaster v. Estate of Gaster,* 92 Neb. 6, the writer of that opinion also said: "No duty of this court is more manifest and exacting than the duty to avoid trespassing upon the province of the legislature. * * * It is not for this court to determine the legislative policy, nor to criticize that policy when adopted by the lawmakers. If apparently matters have been omitted in legislation which would have been supplied if brought to the attention of the

lawmakers, it is not within the province of the court to supply such omissions. Hasty and ill-considered legislation can be revised only by the legislature itself." This is sound doctrine. It is equally true that, when the legislature has spoken in plain and unambiguous language, it is not for the court to interpret language that needs no interpretation, or to disregard and virtually repeal the law. A law may seem to the members of this court to be unwise, but, nevertheless, it is the duty of the court to declare what has been plainly written, and not strain the language in order to inject a new meaning, and thus attain a result that appears to it to be more desirable. It is for the legislature, and not for the court, to repeal or amend a statute.

WILLIAM L. NAIMAN ET AL., APPELLEES, V. MARY BOHLMEYER ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,939.

1. **Homestead:** DESCENT. When the holder of the legal title of a homestead dies, leaving a widow and children, the law creates two new estates, a life estate in the widow and an estate in remainder in the children. These estates, are absolute and do not depend upon occupancy.
2. ———: SALE BY ADMINISTRATOR: VALIDITY. In such case the homestead is not liable for debts incurred by the deceased in his lifetime, and an attempted sale by the administrator to pay the debts of the deceased is void.
3. ———: ———: ———. If the widow buys the land at such administrator's sale, and afterwards conveys it by warranty deed, the grantee in such deed takes the life estate. It is void as to the estate of the children.
4. **Quieting Title:** SUIT BY REMAINDERMEN. The children of the deceased can maintain this action to have their title to the particular estate determined and quieted. The rights of the holders of the life estate and the holders of the particular estate as between themselves are not determined in this action.

APPEAL from the district court for Thayer county: LESLIE G. HURD, JUDGE. *Affirmed as modified.*

J. P. Baldwin and *C. L. Richards,* for appellants.

M. H. Weiss and *J. T. McCuistion, contra.*

SEDGWICK, J.

In January, 1894, Theodore Naiman died, being the owner in fee of a quarter section of land in Thayer county, which he occupied as a homestead, with his wife and four minor children. His widow, Mathilde, was appointed administratrix of his estate, and afterwards intermarried with one Henry Koch, who was substituted as administrator of the estate of Theodore Naiman. As such administrator, Mr. Koch applied to the district court for Thayer county for license to sell the real estate in question. License was granted, and the land was sold by the administrator to his wife, then Mathilde Koch. Afterwards Mathilde Koch, together with Henry Koch, her husband, sold and conveyed the land to Henry Bohlmeyer. Afterwards Henry Bohlmeyer died, and this action was brought by the four children of Mr. Naiman against the widow and children of Henry Bohlmeyer, who were then occupying the premises. The object of this action, as stated in the petition, was to cancel the deed from Henry Koch as administrator to his wife, Mathilde Koch, and also the deed from Mathilde Koch and her husband to Henry Bohlmeyer. The trial court found the issues in favor of the plaintiffs and canceled the deeds accordingly, and the defendants have appealed.

The appellants contend that Mathilde Koch, the widow of Theodore Naiman, having abandoned the land as her home and having taken her children with her, the homestead character of the land ceased. In this, of course, the appellants are mistaken. Under our statute, when the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death. The deed of the ad-

ministrator of the estate of Theodore Naiman to Mrs. Koch was, of course, absolutely void. The land having been the homestead of Mr. Naiman was not subject to his debts. The deed from Mrs. Koch and her husband to Mr. Bohlmeyer would be effectual to transfer the life estate of Mrs. Koch to Mr. Bohlmeyer, and ineffectual for any other purpose. Mr. Bohlmeyer, therefore, and after him his heirs, were the owners of a life estate for the life of Mathilde Koch, and the decree in this case should have disposed of the issues on that basis. This is substantially what the decree does, except that it declares the deed from Mathilde Koch and her husband to Bohlmeyer to be absolutely void. These plaintiffs were entitled to bring this action under sections 6267, 6268, Rev. St. 1913, to have their title to the particular estate determined, and were entitled to have any conveyances interfering therewith canceled.

It is alleged that the land at the time it was deeded to Mr. Bohlmeyer was incumbered by a mortgage, and that Mr. Bohlmeyer has paid the mortgage in part and renewed it in part, and has also made valuable improvements upon the land. Mr. Bohlmeyer and his heirs are entitled to the use and benefit of this land during the life of Mathilde Koch, and were not required to pay the principal of the mortgage, but it was their duty to pay the taxes and interest on the incumbrance. The rights and liabilities of these respective parties, the one as the owner of the life estate, and the others as the owners of the remainder, are of course, not determined in this action.

The judgment of the district court is therefore modified so as to decree the deed from Mathilde Koch and her husband to Henry Bohlmeyer sufficient to convey the life estate of Mathilde Koch, and to cancel the same so far as it attempts to convey the particular estate of these plaintiffs. In all other respects the decree is affirmed. The costs of this appeal should be paid by the parties incurring the same.

MODIFIED AND AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

EDGAR WENQUIST, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 2, 1915. No. 17,944.

1. **Evidence:** RES GESTÆ. The statement by a party to an accident, of a fact directly connected with the accident as a cause thereof, and made contemporaneously with the occurrence, is competent as a part of the *res gestæ*, if such fact is within the knowledge of the party making such statement, but is not competent as evidence of a disconnected fact not within his personal knowledge.
2. **Master and Servant:** INJURY TO SERVANT: LIABILITY. If an employee, who is himself without negligence, is injured by the negligence of his employer, under such circumstances that the injury would not have occurred but for such negligence, the contributory negligence of a fellow servant will not prevent a recovery.
3. ———: ———: ———: SUFFICIENCY OF EVIDENCE. The principal question submitted to the jury was whether the defendant's inspectors misplaced the "controller" which was the primary cause of the accident, and the evidence was of such a nature as to justify submitting this question to the jury.
4. ———: ———: INSTRUCTIONS. The answer alleged that the party complained of as guilty of negligence was a fellow servant, but denied that he was guilty of negligence. The instructions plainly submitted both questions to the jury. Taking the whole case together, the jury could not have been misled by a recital in one of the instructions that "the defendant having plead that the injuries complained of were caused by the act of a fellow servant."
5. ———: ———: ———: FELLOW SERVANT. An error in defining "what constitutes a fellow servant" is immaterial, if, under the undisputed evidence in the case, that relation did not exist and the jury have so found.
6. **Appeal:** VERDICT: EVIDENCE. Unless the evidence is so deficient that it appears from an examination of the whole record that the verdict must have been produced by passion or prejudice or some influence outside of the evidence, in other words, that the verdict is clearly wrong upon the questions of fact presented, this court cannot control the action of the jury.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell,* for appellant.

Sullivan & Rait, contra.

SEDGWICK, J.

The plaintiff, a motorman in the employ of the defendant company, was injured while in that employment, and brought this action in the district court for Douglas county, alleging that the injury was caused by the negligence of this defendant. There was a verdict and judgment in his favor, and the defendant has appealed.

It appears from the evidence that the defendant maintains a car barn in the city of Omaha, in which from 70 to 80 cars are placed for the night. In the early morning, as his duty was, the plaintiff went to the car barn, ascertained the car that he was to take out that morning, and was preparing to do so. At the same time, another motorman, named Mace, was about to take out his car, which stood behind plaintiff's car about eight feet distant. Mace "turned on the overhead electric connection," and his car immediately started rapidly forward, catching plaintiff between the two cars, which caused his injury. There are several car inspectors or repairers, employed by the defendant, whose duty is to inspect and repair, when necessary, the cars in the barn during the night. These inspectors or repairers are under the control of a barn foreman. The plaintiff alleged that, during the nighttime, one of the inspectors inspected the car which was operated by Mace that morning, and "carelessly and negligently left the car standing with the safety lever thrown so that the car might be started when connected with electricity, and carelessly and negligently left the controller thereof set for a forward movement;" that Mace believed that the safety lever and controller were in a position of safety, and so connected the electricity which caused the accident. When the accident happened, plaintiff asked the motorman, Mace, "What were you trying to do?" and he answered, "The damned inspectors left the controller turned on." Defendant's counsel objected to this answer, and the court

at first struck it out, but afterwards, upon a repetition of the question, the same answer was made, and the court overruled the defendant's objection thereto.

It is now insisted that this evidence was incompetent, and that the court erred in allowing it. The controversy at that point was whether the inspectors had misplaced the controller, as plaintiff alleged, or whether the motorman, Mace, had misplaced it. The statement objected to asserted three things: That the controller was turned on; that Mace did not turn it on himself; and that the inspector did. As to the first two, the evidence was competent as a part of the *res gestæ*. The witness Mace at the time was in possession of full knowledge as to whether the controller was turned on at the time that he applied the electricity, also as to whether he himself turned it on; and this statement immediately at the time of the accident should be considered by the jury upon those two important features of the case. It was not error, therefore, to refuse to strike it out. But the motorman had no knowledge as to whether the inspectors, or the foreman of the car barn, or possibly some trespasser, misplaced the controller. None of these could have had any part in the *res gestæ*, and the statement was, of course, incompetent as evidence of such matters. The court should have instructed the jury that this statement was not to be regarded as evidence that the inspectors of the company had turned the controller on, and no doubt would have so instructed the jury if there had been a request for that purpose. No such instruction was requested. The defendant cannot, therefore, rely upon this ruling as prejudicial error.

There is much discussion in the briefs as to whether the inspectors were fellow servants with the motormen. It appears, however, to be conceded that the two motormen were fellow servants. The plaintiff testified that he had been in the service of the company as motorman for several months; that he had a copy of the rules of the company, and that, under rule 10 of the company, it was the duty of the motorman to inspect the car before starting it and see whether it was in first-class condition; and that

they were also "expressly required to look the car over to see that brakes, fenders, and controllers were all in good order." Rule 10 of the company was also in evidence, and it provides: "After signing for their runs and having procured the necessary supplies, conductors and motormen will proceed to inspect the car and see that it is in first-class condition. * * * The motormen will look the car over to see that brakes, fenders, and controllers are all in good order." The plaintiff also testified that Mace, before turning on the electricity, went into the vestibule of the car, and was standing in the vestibule in front of all the mechanism when he turned on the electricity. He was then asked this question: "And was all there where he could put his hand on it, even if it were as dark as Egypt, and tell whether the power was turned off or whether the reverse was on or off, couldn't he? He could tell that from the feeling of it, if he wanted to? A. Yes, sir." If we consider that, under the rule of the company and the circumstances disclosed by this evidence, the motorman, Mace, was guilty of negligence in turning on the overhead electricity without knowing that the controller was in place, will such contributory negligence on the part of a fellow servant prevent a recovery? The question has been answered in the negative by this court. In *Van Horn v. Cooper & Cole Bros.*, 88 Neb. 687, 696, it is said: "The law appears to be well settled that, if the injured servant was free from contributory negligence, the master would be liable where such injury was caused by the concurrent negligence of the master, or his vice-principal, and of a fellow servant. 26 Cyc. 1302, and cases cited in notes." The note referred to cites a large number of cases in the various states which seem to establish this rule beyond further controversy.

The defendant contends that the car inspectors and the motormen were fellow servants, and that the plaintiff cannot recover for an injury caused by the negligence of the car inspectors. The question is presented at great extent in both briefs. It is frequently difficult to apply the fellow-servant doctrine. In this case, however, it seems there

can be little doubt. The car inspectors were under the direct control of the car barn foremen. These foremen had no control whatever over the motormen. The motormen reported to the superintendent and were under his direction. In *Nocita v. Omaha & C. B. Street R. Co.*, 89 Neb. 209, it was said: "To make the rule applicable there must be some consociation in the same department of duty or line of employment." The motormen and inspectors were not engaged in the same duties. Indeed, there was no consociation of duties between them. The plaintiff cites *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363, *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, and *McDonald v. Michigan C. R. Co.*, 132 Mich. 372, which are similar cases and seem to be in point.

The trial court instructed the jury that, unless they found that "one of the inspectors of defendant, during the night and prior to the accident, carelessly and negligently left the car, which moved up to and against the plaintiff, to stand with the safety lever thrown so that the car might be started when connected with electricity, and carelessly and negligently left the controller thereof set for a forward movement, so that, when the overhead connection was made, the car started forward and crushed and injured the plaintiff," they must find for the defendant. This instruction followed the allegation of the petition, which was that the acts of negligence of the inspector "were the sole and exclusive cause of the injuries received by the plaintiff." It is contended that the evidence will not justify the finding of the jury that the inspectors left the controller out of place. It appears that there were two inspectors employed in this car barn on the night in question. One of them testified that there were 75 or 80 cars in the barn; that these cars stood upon 10 different tracks; and that their duties did not require them to inspect all of these cars, but only such as had been reported for inspection. The evidence is that these cars are left at night close together. The two cars were about eight feet apart, as the motorman found them on the morning of the accident. The evidence tends to show, and the jury might have found

from the evidence, that the motorman, Mace, did not misplace the controller. The barn is not a public place; it is under the exclusive control of the defendant during the night, and every one is excluded except the inspectors and the foremen of the barn. Misplacing this controller was the negligent act which was the primary cause of the injury. If this was not done by the motorman, Mace, it must have been done either by the motorman who brought the car to the barn the night before or by the car inspectors. The motorman who brought the car into the barn was not called as a witness. He was in the employ of the defendant, and presumably, if he left this controller misplaced, the defendant would have proved that fact by him. These circumstances pointed directly to the inspectors as the parties who misplaced this controller. The defendant attempted to rebut this presumption. One of the inspectors testified that he did not think that he had anything to do with the car that night, but he testified that he thought the car in question stood on track No. 3, and was the third car north from the door. There was evidence that the car in question was on track No. 2, and that it was the second car from the door. The inspector also testified that he could not remember what cars he examined; that he probably examined 35 or 40 cars. He could not remember whether he moved some of them or not, but that it was sometimes necessary to move them. The other inspector was also a car repairer, and was in reality an assistant to the principal inspector. His testimony is a little more definite in regard to whether he had anything to do with the car in question, but is not so direct and positive as to remove all doubt upon that matter. Upon the whole case, the evidence that these inspectors misplaced this controller is not clear and satisfactory, but we cannot say that the verdict of the jury is so wholly unsupported on this point as to require us to reverse their finding.

The fourth instruction given by the court recites that "the defendant having plead that the injuries complained of were caused by the act of a fellow servant." This is not strictly accurate. The defendant did not plead that

the injuries were caused by the act of a fellow servant; but, while denying that the inspectors were guilty of negligence which caused the injury, the answer contained the allegation that the inspectors and motormen were fellow-servants. It is complained that this recital in the instruction is inconsistent with a subsequent clause in the same instruction which submitted to the jury the question of negligence of the inspectors. It does not appear that the jury could have been misled by this inaccurate recital in the instruction. Taken altogether, the instruction was plainly that it was contended by the defendant that the action was not due to any carelessness of the inspectors, and that question was fairly submitted to the jury.

It is also complained that the same instruction "incorrectly defined what constitutes a fellow servant." It is not necessary to discuss this instruction in that respect, since under the circumstances in this case the court might have instructed the jury that the motorman and inspectors were not fellow servants.

The questions of fact involved in this case are peculiarly within the province of the jury. This court is not authorized to retry those questions. Unless the evidence is so deficient that it appears from an examination of the whole record that the verdict must have been produced by passion or prejudice or some influence outside of the evidence, in other words, that the verdict is clearly wrong upon the questions of fact presented, this court cannot control the action of the jury.

The judgment of the district court is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

ANTON PITELA, APPELLEE, V. DOMINEK ROUBLICEK, APPELLANT.

FILED JANUARY 2, 1915. No. 17,955.

1. **Appeal:** REVIEW: PLEADING. When part of an answer is stricken out by the court, and no exception is taken to such ruling, and an amended answer is filed upon which the case is tried, error cannot be predicated upon such ruling of the court.
2. ———: AFFIRMANCE. The evidence is found sufficient to support the verdict, and, no error being pointed out requiring a reversal, the judgment is affirmed.

APPEAL from the district court for Saunders county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Burr, Greene & Greene, for appellant.

E. E. Placek and *P. P. White, contra.*

SEDGWICK, J.

The plaintiff brought this action against the defendant in the district court for Saunders county to recover damages for an alleged assault and battery. The defendant answered, setting up what he called a counterclaim, somewhat in the nature of an offset for prior damages. On motion of the plaintiff, this was stricken out. The defendant then filed an amended answer. No exception was taken to the ruling of the court in striking out a part of the former answer, and, of course, by filing the amended answer the ruling of the district court was acquiesced in.

In addition to a considerable argument in regard to the right of defendant to counterclaim damages, which, of course, has no application to this case in the condition of the record, the defendant briefly alleges in the brief that the evidence is not sufficient to support the verdict, and that there were errors of the court. No parts of the record are referred to containing the supposed errors, and there is no ground for the contention that the verdict was

not supported. The plaintiff and several witnesses testified to the assault and battery, and the defendant himself substantially admitted the same.

No error is pointed out in the record, and the judgment of the district court is

AFFIRMED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

JOHN EYRE ET AL., APPELLANTS, V. JOHN A. DOERR, APPELLEE.

FILED JANUARY 2, 1915. No. 18,701.

1. **Intoxicating Liquors:** LICENSE: MUNICIPAL ORDINANCE. Under the laws of this state, no license can be issued for the sale of intoxicating liquors unless an ordinance is first passed authorizing such license and regulating the same. Whether an ordinance prohibiting such sale has any force or effect, *quære*.

2. ———: ———: ———: VALIDITY. An ordinance purporting to authorize the sale of intoxicating liquors, which contains no regulation as to "what officer or officers shall receive, file, and give notice of the application" for license, nor "who shall take and approve the bond of the applicant, and sign and issue the license," and omits other necessary regulations, is invalid and will not authorize the granting of license.

3. ———: ———: PETITION: SUFFICIENCY. No proceeding can be taken by the mayor and council upon the application for license until a petition is filed containing the allegations provided by statute and signed by the required number of resident freeholders.

4. **Municipal Corporations:** ORDINANCE: INITIATIVE AND REFERENDUM. When a petition for an ordinance under the initiative and referendum statute is filed with the city clerk, and "the mayor and city council convened before such proposed ordinance can be legally submitted to a direct vote of the voters," the clerk must "forthwith present to such body a certified copy of the proposed ordinance." If the proposed ordinance "is not made law by the mayor and city council" within the specified time, the "clerk shall submit the same to the voters." If the mayor and council are so convened, the clerk cannot submit the ordinance to the voters without first presenting it to the mayor and council.

5. ———: ———: ———. An ordinance adopted by the voters under the initiative statute does not "go into effect" until 30 days after it is adopted.

6. **Intoxicating Liquors:** LICENSE: PETITION: AMENDMENT. A petition for license, which does not allege that the applicant is a man of respectable character and standing and a resident of this state, is insufficient, and any proceedings attempted thereunder will be void. An amendment of the petition in this respect, with or without the consent of the petitioners, will not validate proceedings of the mayor and council thereon which were taken when no sufficient petition was on file.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

A. G. Wolfenbarger, R. M. Proudfit, J. H. Agee, S. R. Buck and *H. S. Lower,* for appellants.

Bernard McNeny, contra.

SEDGWICK, J.

On the 7th day of April, 1914, at an election held for that purpose under the initiative and referendum statute, the voters of the city of Superior, in Nuckolls county, a city of the second class having more than 1,000 and less than 5,000 inhabitants, adopted an ordinance forbidding the licensing of saloons. Afterwards, on the 22d day of May, 1914, at a special election held for that purpose, an ordinance was adopted relating to and regulating the sale of malt, spirituous and vinous liquors in the city of Superior. Under this last ordinance, John A. Doerr applied for a license and filed with the clerk of the city his petition signed by more than 30 of the freeholders of the city. A remonstrance was filed, and upon the hearing the city council granted the license. The remonstrants appealed to the district court for that county, and by the judgment of the court the action of the city council was affirmed. Remonstrants have appealed to this court.

A number of curious, and some of them technical, questions are presented and discussed in the briefs. We find it necessary to notice only a portion of them. The first ordinance, of April 7, orders that no saloon license shall

be granted, and that "no person, firm or corporation shall be licensed to sell malt, spirituous or vinous or intoxicating liquors within the corporate limits of the city of Superior." It makes an exception in the case of sales for "medical, mechanical or sacramental purposes." This ordinance accomplishes nothing that was not already the law of this state. No license for the sale of intoxicating liquors could be issued by the authorities of the city without first adopting an ordinance providing therefor and regulating the manner of issuing the license. This first ordinance is treated in the briefs as having some force or effect, and it does not appear to be necessary to determine that question. It is also a serious question whether the second ordinance, of May 22, is valid. No license can be granted unless there is first an ordinance providing therefor, and until such ordinance is enacted no application for license can be made and no other step taken towards procuring such license. This was first decided in *State v. Andrews,* 11 Neb. 523, and was afterwards approved and affirmed in *Hornberger v. State,* 47 Neb. 40. From the *Andrews* case it appears that the statute requires the ordinance for the purpose of determining the policy of the village as to whether it will, or will not, license saloons, and also for the purpose of regulating the issuance of licenses. Unless the ordinance supplies those regulations which are not supplied in the statute, no license can be issued. The opinion recites some of the regulations that the ordinance must contain. It must provide that a license can be granted, "what officer or officers shall receive, file, and give notice of the application, * * * who shall take and approve the bond of the applicant, and sign and issue the license." And the opinion says that there are other important matters that can be regulated only by ordinance passed in due form, "and, until so regulated no application can be made and no other step taken." This ordinance does not appear to contain those things which are said, in the opinion referred to, to be absolutely necessary to the validity of the ordinance.

It appears that the city council was in session within the 30 days after the filing of the petition for the election at which the second ordinance was adopted. The statute provides: "If the mayor and city council be convened before such proposed ordinance can be legally submitted to a direct vote of the voters, the clerk aforesaid shall forthwith present to such body a certified copy of the proposed ordinance and the demand for the submission of the same on file in his office." It also provides that, if the proposed ordinance is not made a law by the mayor and council "within 30 days from the filing of the same with such clerk, the said clerk shall submit the same to the voters according to the provisions of this article." Rev. St. 1913, sec. 5232. If the section of the statute is complied with and the city council enacts the ordinance as proposed, the expense and delay of the election is avoided. It is a serious question whether the clerk can disregard this provision of the law and proceed with the election without submitting the ordinance to the mayor and council.

Section 5237, Rev. St. 1913, provides: "No ordinance for the government of any city aforesaid in this state, except as hereinafter provided, shall go into effect until 30 days after the passage of the same." It is contended by counsel for the applicant that this section applies only to the passage of an ordinance by the mayor and council. But this section was a part of the original act providing for the initiative and referendum. Laws 1897, ch. 32, sec. 12. Prior to that act there was no such provision in regard to ordinances enacted by the mayor and council, and in the act of 1897 there is no other provision than this in regard to the time when the ordinance adopted by the people shall take effect. If this ordinance did not take effect until 30 days after its adoption by the voters, it was not in force when the application and petition for the license were filed, nor was it in force 10 days before the last publication of the published notice. And it would follow that for this reason the board was without jurisdiction to act upon the petition, even if we should consider that the ordinance in question is valid.

The petition for the license did not contain the allegation that the applicant is a man of respectable character and standing and a resident of this state. The statute expressly requires this allegation in the petition. Rev. St. 1913, sec. 3844. It has been many times held by this court that the petition is jurisdictional, and that it must contain all of the allegations provided by the statute. *State v. County Commissioners,* 12 Neb. 54; *Steinkraus v. Hurlbert,* 20 Neb. 519; *Maxwell v. Reisdorf,* 90 Neb. 374. See, also, 23 Cyc. 125. The rule is perhaps technical, but it has been so long recognized as the rule in this state that to depart from it now would be legislation.

For these reasons, the judgment of the district court is reversed and the cause remanded, with directions to cause the license to be canceled.

REVERSED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

JOHN EYRE ET AL., APPELLANTS, V. ANDREW FREY, APPELLEE.

FILED JANUARY 2, 1915. No. 18,700.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

A. G. Wolfenbarger, R. M. Proudfit, J. H. Agee, S. R. Buck and *H. S. Lower,* for appellants.

Bernard McNeny, contra.

SEDGWICK, J.

The proceedings in this case involve the same ordinances considered in *Eyre v. Doerr, ante,* p. 562. There is the same objection to the published notice, and other similar questions raised. For the reasons stated in that case, the

judgment of the district court is reversed and the cause remanded, with directions to cause the license to be canceled.

REVERSED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

JOHN EYRE ET AL., APPELLANTS, V. CHARLES F. ABBOTT, APPELLEE.

FILED JANUARY 2, 1915. No. 18,702.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

A. G. Wolfenbarger, R. M. Proudfit, J. H. Agee, S. R. Buck and *H. S. Lower,* for appellants.

Bernard McNeny, contra.

SEDGWICK, J.

The proceedings in this case involve the same ordinances considered in *Eyre v. Doerr, ante,* p. 562. There is the same objection to the published notice, and other similar questions raised. For the reasons stated in that case, the judgment of the district court is reversed and the cause remanded, with directions to cause the license to be canceled.

REVERSED.

LETTON, ROSE and FAWCETT, JJ., not sitting.

MARY A. ROSENCRANS, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED JANUARY 2, 1915. No. 17,846.

1. **Death:** PRESUMPTION. Where absence of the person insured is shown to have continued for seven years or more, unaccompanied by circumstances which reasonably account therefor on a theory not involving death, it is sufficiently strong to cast the burden of rebutting it on the party who asserts the continuance of life.
2. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to warrant the presumption of death from the absence shown.

APPEAL from the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Benjamin D. Smith and *Nelson C. Pratt*, for appellant.

W. W. Slabaugh and *James T. Begley, contra.*

HAMER, J.

The defendant and appellant, Modern Woodmen of America, is a corporation and a fraternal beneficiary association. On the 8th day of October, 1892, it issued a benefit certificate to Charles H. M. Rosencrans, the husband of the plaintiff. The certificate provided that on the death of said Charles H. M. Rosencrans the defendant would pay to Mary A. Rosencrans, the plaintiff herein, the sum of $2,000. The plaintiff and her husband resided at Papillion, Nebraska. For a considerable time prior to the 9th day of September, 1903, the husband was working as a carpenter for Swift & Company, in South Omaha, and the plaintiff lived with the children at Papillion, Nebraska. Rosencrans boarded with a Mr. and Mrs. Ashburn at South Omaha, and generally went home to Papillion on Saturday nights, returning to South Omaha Monday mornings. It appears that on or about September 9, 1903, Mr. Rosencrans told Mrs. Ashburn that he was going up to the Odd Fellows Hall in Omaha to see a man buried, and that he

expected to be back that evening. The body of the man who was to be buried was shipped away, and so there was no burial. Rosencrans did not return that night, and up to date he has failed to come back. The plaintiff commenced an action in the district court for Sarpy county on the 26th day of December, 1911, against the defendant, Modern Woodmen of America, for the sum of $2,000, with interest, and the costs of the suit. She recovered a judgment on the 22d of June, 1912, against the said defendant for $2,052.10, together with interest from the 10th day of May, 1912, at 7 per cent. per annum, and the costs. From this judgment the defendant appeals.

The evidence shows that Rosencrans had lived 34 years in Nebraska. He and his wife had lived together 23 years. Most of the time they had resided at Papillion. They had a family of four children. Rosencrans was a most industrious man, much devoted to his family, and was a member of at least three fraternities, the Masons, Odd Fellows, and Modern Woodmen. He owned a home in Papillion and also a residence property in Omaha. He was a Dane, and came from Copenhagen, Denmark. He seems to have been affectionate to his wife, and wrote to her every week when he was absent from home. He also wrote to the children, and they wrote to him. The daughter was a school teacher. He and his wife seem to have lived together happily. The fraternal orders assisted in making a search for the lost husband. They got the assistance of the police. They engaged in a wide correspondence. The defendant produced the evidence of a Mr. Beadle, who testified that he had seen Rosencrans in the latter part of October, 1904, at Winnemucca, Nevada. He testified that he went into a restaurant to get supper between 6 and 7 in the evening and saw Rosencrans sitting at the table eating supper; that he spoke to him and said to him "I thought you was dead;" that he talked with him about 15 minutes, and was told by him that he was working for the Southern Pacific Railroad Company.

Mrs. Rosencrans procured her counsel, Mr. Holmes, to investigate concerning whether her husband had been at

Winnemucca. It appears that the lawyer wrote to the foreman of the shops at Winnemucca, and received a letter from him. The foreman examined a photograph of Mr. Rosencrans, and said that "he knew of no such man ever having worked there." On objection being made by the defendant, this evidence was stricken out.

It is contended by the defendant that, as there is evidence to show that the husband of the plaintiff was seen after he left Nebraska, therefore the presumption that he is dead by reason of the expiration of seven years is removed. It is contended that there must be a lack of information concerning the absentee on the part of those likely to hear from him after diligent inquiry; that the inquiry should extend to all those places where information is likely to be obtained and to all those persons who, in the ordinary course of events, would be likely to receive tidings if the party were alive, whether members of his family or not, and that in general the inquiry should exhaust all sources of information which the circumstances of the case suggest.

The insured seems to have been attached to his family, and it was strange that he should leave his wife and children as he appears to have done. We should not lose sight of the fact, however, that his wife forbade him to visit Mrs. Graham, the woman who had slandered her and her daughter. This fact may not throw much light on the subject, but Mr. Rosencrans may have been very impatient of his wife's interference touching the question of whether he was at liberty to visit Mrs. Graham. It is not shown that they quarreled about this matter, but it is shown that the relations between the plaintiff and Mrs. Graham were, to say the least, unfriendly, and that the plaintiff denied to her husband permission to call upon Mrs. Graham. That fact appears to show the only jar in their lives. That alone may have been reason enough why the assured would leave his wife and his family, and, once having left them, he would be subject to other influences which might prevent him from returning. The facts do not appear to stand in the way of the plaintiff's right of recovery. No one may

know whether the assured is really dead or alive. He has been gone since that particular day when he dropped out of sight. It was for the jury to say whether they believed the testimony of the witness Beadle. If they did not believe his evidence (and they may have felt bound to question it) there was nothing to prevent the application of the usual rule which would enable the jury to consider the presumption of the assured's death a fact after the expiration of seven years. It is more than eleven years since the assured went away. There is nothing strange that he should die at his time of life.

The case of *Modern Woodmen of America v. Gerdom*, 72 Kan. 391, is criticized in *Miller v. Sovereign Camp, W. O. W.*, 140 Wis. 505, where the court refused to follow it. The court say: "Proof of diligent search and inquiry is not required to establish the presumption of death of a person who has been absent from his home or place of residence for seven years." On the question of residence the court further say: "The general rule is that a man must have a habitation somewhere and that he can have but one, and that in order to lose one he must acquire another." The court refers to the *Gerdom* case, which is cited by the defendant, and refuses to follow it, and quotes from 1 Greenleaf, Evidence (16th ed.) sec. 41, as follows: "After the lapse of seven years without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party. * * * It is sufficient, if it appears that he has been absent for seven years from the particular state of his residence, without having been heard from."

In the *Gerdom* case the assured was last seen at other places than his home, the residence of his mother, and there were also rumors as to his whereabouts. In that case there was no proof that the son had acquired a new residence, and the court was held to have rightly presumed that his residence was with his mother. In the *Gerdom* case the father and mother were beneficiaries on a certificate issued to the son. The son left his parent's home in Topeka, Kansas, on August 15, 1895, for California. In

December of that year he wrote to them. In August, 1896, they learned from his employer that he was last seen in May of that year. The court say: "In this case Joseph Gerdom (the father) was the only witness produced to prove want of intelligence from the absentee at his former place of residence, and he spoke for himself alone. * * * The young man's mother and his brothers and sister were not called." The son may have continued to correspond with his sister for years after leaving Oakland, and may even be in correspondence with her now. His last word to his family was that he intended to stay in California for some time at least, and it was the duty of the plaintiffs to secure information there. *Whiteley v. Equitable Life Assurance Society,* 72 Wis. 170. In *in re Estate of Harrington,* 140 Cal. 244, the court hold that a wife is not bound to make inquiry as to the whereabouts of her husband, who has been absent for ten years without advising her concerning his movements. It is the duty of the husband to inform his wife of his whereabouts.

In *Magness v. Modern Woodmen of America,* 123 N. W. 169 (146 Ia. 1), the court said: "The presumption of death from absence is not conclusive; but, when absence is shown to have continued for seven years or more unaccompanied by circumstances reasonably accounting therefor on a theory not involving death, it becomes sufficiently strong to cast the burden of rebutting it on the party asserting continuance of life." In that case Magness disappeared from Iowa City June 13, 1899. In September his wife received a letter, purporting to be written by him in South Dakota, saying that he would return in October. Afterwards he wrote her, saying that he was going to Minneapolis, and requesting her to write him at that city. She did so, but the letters were undelivered. Nothing in his previous history indicated a purpose to repudiate his duty to his family. The court said: "No greater wrong could be done to the character of the man than to account for his absence even after the lapse of a few short months upon the ground of a wanton abandonment of his family and friends." In that case the lower court found

for the plaintiff, and the appellate court affirmed the judgment. It was said in the opinion: "There was no direct evidence of Magness' death; but the fact was sought to be established by circumstances, the chief of which was the disappearance of said insured person from his home and from the knowledge of his family and friends for a period of more than seven years."

In *Holdrege v. Livingston,* 79 Neb. 238, this court said: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." In that case it was further said: "Where a party leaves his domicile with the avowed intention of establishing some specific new abode, the inquiry must follow him to such new domicile, but * * * there is a total lack of any evidence that Elijah Noyes * * * did in fact establish any new residence or place of abode."

It is contended by the defendant that the court erred in giving instruction No. 3. In that instruction the jury were told, in substance, that the presumption of life continues for seven years, under ordinary circumstances, after the unexplained disappearance of a man from whom no tidings return to his friends or acquaintances, and that then the presumption of death arises; that this presumption may be overthrown by evidence of facts and circumstances surrounding such disappearance which tend to affect the inference of continued life or early death, and in arriving at their conclusion the jury should consider the facts and circumstances and possible motives of the missing man to absent and conceal himself, as also his attachment to the members of his family and his friends, and his prospects in business, his character and habits, and the extent of the search made for him. It was then said: "Accordingly, if you find by a preponderance of the evidence that the insured, Charles H. M. Rosencrans, left his home and has been continuously absent therefrom for a

period of seven years prior to the 26th day of December, 1911, without any intelligence of his whereabouts being received from or concerning him during that time by his family or friends who, were he living, would naturally hear from him, then such continued absence, together with such lack of intelligence concerning him, would, if unexplained, raise the presumption of his death, and in that event, if the presumption has not been overthrown by evidence in the case, your verdict should be for the plaintiff."

We are unable to see any prejudicial error in the foregoing instruction. Mrs. Rosencrans and the various organizations of which her husband was a member seem to have more or less diligently searched for him. The testimony of the witness Beadle, who claims to have seen Rosencrans at Winnemucca, was not very satisfactory. The jury may well have questioned it. The interview with the husband at Winnemucca seems to have been exceedingly brief. In any event, the attorney who represented the plaintiff made inquiry about the matter, and the plaintiff saw the letter which he received from Winnemucca. But whether this interview did or did not occur, and whether the insured was ever at Winnemucca or was never there, is perhaps immaterial under the law as we conceive it to be.

In *Holdrege v. Livingston,* 79 Neb. 238 this court said: "The rule is settled that the presumption of life with respect to persons of whom no account can be given ends at the expiration of seven years from the time they were last known to be living, after which the burden of proof is devolved on the party asserting the life of the individual in question. 2 Greenleaf, Evidence (16th ed.) sec. 278*f*."

The insured seems to have been a man of excellent habits and of a domestic turn of mind. There are many reasons to suppose that he would return to his family if he were living and able to do so. Under the rule established in this state and in some other jurisdictions, the insured is presumed to be dead after the expiration of seven years from the time he was last known to be living. In this case more than ten years have elapsed since that time. We

find abundant evidence in the record to sustain the judgment of the lower court.

The judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

WILLIAM H. HORTON, APPELLANT, V. WILLIAM B. HOWARD, AUDITOR, APPELLEE.

FILED JANUARY 2, 1915. No. 18,615.

1. **Counties: COMMISSIONERS: ORDERS: VALIDITY.** Where one of the county commissioners has moved out of the commissioner district in which he resides into the district of another commissioner, and who continues to act as a member of the county board, the fact of such removal does not render an order of such county board a void order.
2. ———: **BONDS: VALIDITY.** Where a special election is held to issue bonds for the purpose of building and furnishing a court-house and jail, and the same has been ordered to be held by the county board and the proper steps have been taken in the regular way to cause such election to be held, and the bonds are carried, there is no reason to attack their validity because one of the members of the board had moved into another commissioner district.
3. **Evidence** examined, and *held* to sustain the judgment of the district court.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Sterling F. Mutz and *Harold M. Noble,* for appellant.

Grant G. Martin, Attorney General, and *George W Ayres, contra.*

HAMER, J.

William H. Horton, the plaintiff, commenced an action in the district court for Lancaster county, Nebraska,

against William B. Howard, the auditor of public accounts of the state of Nebraska. The purpose of this action was to enjoin the registration of certain bonds issued by the county of Keya Paha. An answer was filed to the petition, and there was a reply to the new matter in the answer. On the trial the court found for the defendant and against the plaintiff, and denied the prayer for an injunction and dismissed the plaintiff's cause of action. The plaintiff appeals from the judgment of the district court. No supersedeas bond was allowed.

The bonds sought to be enjoined were registered and sold. The plaintiff alleges in his petition that he is a resident, a taxpayer, and a legally qualified elector of Keya Paha county. The bonds issued were courthouse bonds and jail bonds. There were 17 of them, each for $1,000. The complaint is that the bonds were illegally issued and void. It is claimed that the history of the bonds is false, and that it does not contain a correct copy of the records of Keya Paha county; that the records of that county do not show that the resolution and notice set forth in an exhibit attached thereto were signed by the chairman of the board of county commissioners and by Willard Sprague, a commissioner; that there is no showing that a vote was had upon the resolution and notice and proposition to issue the bonds; that the records of the county clerk do not show action by the county board of county commissioners as shown in the statement and history; that the resolution calling the election to vote on the proposition to issue the bonds was not adopted by a majority vote of the county commissioners; that Herbert Cottrill voted for said resolution; that Albert Stoltenberg voted against said resolution; and William Sprague was disqualified because before the meeting at which the resolution was offered he vacated his office by removing from the district; that only three commissioners were elected, and that the vacancy caused by the disqualification of the said William Sprague was not filled by appointment or otherwise; that the proposition submitted in paragraph two of the notice proposes to issue bonds "for the purpose of purchasing material for

the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building," whereas the official ballot provided for in the resolution and notice proposes to issue bonds "for building and finishing a courthouse building and jail building" and for building and furnishing a courthouse and jail building; that the propositions to build the courthouse building and a jail were submitted together and were not separate, and that the voters were compelled to vote for both or against both, and were thereby prevented from expressing their true will; that the notice without the resolution or other commissioners' proceedings attached was published only in the issues of May 1, May 8, and May 15, 1913, of the Springview Herald; that it was not published in the issues of said paper on the 22d of May, 1913; that the resolution and notice required the publication of both the resolution and notice, whereas the notice only was published in the issues of May 1, May 8, and May 15, 1913; that the bonds presented for registration indicate the purpose of the issue to be for "furnishing" a courthouse and jail in addition to the erection of said buildings; that the taxpayers of Keya Paha county are without remedy unless in a court of equity; that no remedy whatever can be had in a court of law; that no remedy can be filed in a court of law; that, if the defendant proceeds to register the bonds and in making a certificate of the legality of their bonds, the said bonds will be given official validation; that a purchaser of said bonds would be required to look only for the certificate of the said defendant; that, if the bonds were sold, the purchaser would be an innocent purchaser for value without notice of the defects and the illegality of the issue of said bonds; that, unless the defendant be restrained from registering said bonds and from issuing the certificate of legality of issue the said county commissioners of Keya Paha county will proceed to sell said bonds and will use the proceeds to erect a courthouse and jail and to levy taxes upon the petitioner and the other taxpayers of the county to pay the principal and interest of said bonds.

There was a prayer for a temporary injunction restraining the defendant from registering said bonds and from making the certificate showing that the bonds had been voted and issued in accordance with law, also from signing the approval of the said defendant upon said bonds; that on the final hearing the injunction should be made perpetual and said bonds declared illegal and void.

The history recited that at an adjourned session of the regular January meeting of the board of county commissioners of Keya Paha county, Nebraska, held in the office of the county clerk in said county on the 14th day of April, 1913, all of the members of said board of county commissioners were present, and that there came up for consideration the matter of the advisability of submitting to the legal voters of said county at a special election to be held on the 24th day of May, 1913, a proposition to issue the bonds of said county for the purpose of erecting a courthouse and jail; that it was moved by Herbert Cottrill and seconded by William Sprague that an order and resolution should be adopted making it the duty of the county commissioners to provide a safe and suitable courthouse and jail and every necessary of the buildings, and to provide suitable offices for the county officers and for the courtrooms and offices for the accommodation of the several courts of record, also fire-proof safes and vaults for the safe-keeping of county records. This resolution also recited that the county courthouse was in an unsafe condition, inadequate for the accommodation of the several county offices and courts of record, and that there was no safe in which to keep the county records; also, that the vaults wherein the records of said county were stored were unsafe, and that said records were likely to be destroyed. And it was resolved by the board of commissioners of Keya Paha county at an adjourned meeting of the regular January session, 1913, that a special election be called to be held in said county on Saturday, the 24th day of May, 1913, to submit to the legal voters of said county a certain proposition, to wit: "Shall the board of county commissioners of Keya Paha county, Nebraska, for and on be-

half of said county issue the bonds of said county in the sum of seventeen thousand ($17,000) dollars of the denomination of one thousand ($1,000) dollars each for the purpose of purchasing material for the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building for said county, in the town of Springview, the county seat of said county, on the courthouse block in the said town of Springview, known and described as block one (1) of the village of Springview, Keya Paha county, Nebraska, and all the costs thereof not to exceed the sum of seventeen thousand ($17,000) dollars, the entire amount of said bonds to be payable to bearer at the Nebraska fiscal agency in New York City at the expiration of twenty years from the date thereon, interest to be made payable on the first day of December, 1913, and on the first day of June and December in each year thereafter, said bonds to draw interest at the rate of five and one-half per cent. per annum from date of issue of same, payable semiannually?"

The form of the ballot was also set out and the places where the election should be held, naming ten certain precincts. There was also in the said history the affidavit of the publisher issuing the weekly newspaper in which the said notice had been published. There was also the certificate of the county clerk of the said county of Keya Paha showing that a proper canvass of the returns upon said proposition had been made as provided by law, and that the said canvassing board found that 421 votes were cast authorizing the county board of county commissioners of Keya Paha county to issue said bonds. On the 29th day of May, 1913, it was found that there was a proposition to issue the bonds of said county in the sum of $17,000 to build and finish the said courthouse and jail building, and that due and legal notice of the submission of said proposition was given by publication of the said notice in the Springview Herald for four consecutive weeks beginning in the issue of April 24, 1913, and running through the issues of May 1, 1913, May 8, 1913, May 15, 1913, of said paper. The said proceedings are set out at great

length, and we cannot set them out in full without greatly and unnecessarily extending this opinion.

The defendant, William B. Howard, answered admitting that 17 bonds of the county of Keya Paha, Nebraska, of the denomination of $1,000 each, accompanied by a history thereof, had been received from the county clerk of Keya Paha county with the request that said bonds be registered according to law and the certificate of the defendant be attached to said bonds showing that they had been voted in accordance with the law and that they were legally issued. There was also the statement of the said defendant that he was about to register said bonds and make a certificate that the same had been issued and voted according to law, and that he was ready to do so unless restrained by the order of the court. It was also alleged that Herbert Cottrill and William Sprague voted for the resolution submitting the question of the issue of said bonds, and that Albert Stoltenberg voted against said resolution; that said William Sprague, prior to the time he voted for said resolution, had removed from the commissioner district in which he resided at the time of his election into another commissioner district; but it was further alleged that the term for which the said William Sprague was elected had not expired, and that he had not resigned therefrom, but continued to perform the duties of the office of county commissioner in said county, and was recognized as a member of said board of county commissioners by the other members thereof and by the people of said county generally. Also, that the resolution submitted the proposition to be voted upon, "for the purpose of purchasing material for the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building," etc. Also, the defendant answered admitting that the first publication of the notice was on the 24th day of April, 1913, and that the same was thereafter published May 1, May 8, and May 15, 1913, and that the publication was in a legal newspaper; that the bonds presented indicated the purpose of the issue to be to raise money for furnishing a court-

house and jail as well as to raise money for the erection of such buildings.

There was a reply to the answer denying the allegations of new matter. Upon the trial the district court found for the defendant and against the plaintiff, and dismissed the plaintiff's petition. Plaintiff's motion for a new trial was overruled.

The record fails to show that any supersedeas bond was filed. The bonds have been registered and sold and delivered. We have read the bill of exceptions. It shows that there was no proceeding to oust Commissioner Sprague, and that there was no appointment made to fill the alleged vacancy caused by the removal of Sprague from one commissioner district to another. It was also stipulated that the exhibit attached to the plaintiff's petition contained a true and correct copy of the history of the bonds as submitted to the auditor when application was made for their registration; also, that the bonds recited that they were issued for the erection and furnishing of a courthouse and jail; also, that for the last 15 years it has been the custom of the newspapers of Springview to publish the proceedings of the county commissioners from time to time, giving their action upon the various subject-matters coming before them and disposed of by them.

F. J. Rhodes testified on behalf of the relator that he had made an investigation of the records of Keya Paha county in relation to the passage of the resolution and notice calling an election—the one in controversy; that he did it previous to the commencement of the suit; that he investigated the records of the county clerk and of the board of county commissioners of Keya Paha county, and that he did not find the words following the resolution, "On motion the above resolution was adopted as read this 14th day of April, A. D. 1913, at Springview, Nebraska. John Scheie, County Clerk of Keya Paha county." On cross-examination he testified that he did not know whether the resolution passed or not.

There is also a stipulation in the record showing that the county attorney of Keya Paha county wrote to the

attorney general of the state of Nebraska, and received from him a letter to the effect that, "if the boundaries of the district were changed arbitrarily by the board, so that a commissioner was changed from the district from which he was elected, our court has held that this would not deprive him of holding the office for the full term. But, where he does an act himself that places him outside the boundaries of the district, evidently it would be different. The safer course to pursue is for the commissioner to be a resident of the district he represents." It does not appear that Sprague was advised that he should give up the office of county commissioner, and he appears to have retained the office and to have continued to serve as such county commissioner. There was a unanimous vote of the county board that the bonds should be issued. There was also a vote to the effect that the office of William Sprague as county commissioner had not expired.

The notice published states the amount of the bonds to be voted, the interest they are to draw, the time for which the bonds are to run, the date of the election, and the polling places. This is sufficient. Rev. St. 1913, sec. 956.

In *Linn v. City of Omaha*, 76 Neb. 552, there was to be a bond issue of $60,000 to pay for the construction of fire-engine houses for the use of the fire department of the city of Omaha. There were other particulars stated in the notice. The ballot label upon the voting machine was: "Shall the city issue $60,000 fire-engine house bonds to run 20 years at 4%?" It was said that the ballot label was not intended to furnish information to the voter in detail as to the object of the election; that the proclamation was notice of the election and fully informed the electors of the object of the election; that the object of the inscription was to instruct the voter as to how he might vote intelligently on the question of which the proclamation gave him notice.

In *Calahan v. Handsaker*, 133 Ia. 622, there was a resolution by the directors of the school township to submit the question at an annual meeting where bonds in an

amount not exceeding $4,000 should be issued to erect the schoolhouse. The notice of the meeting recited that the question was whether the township should issue bonds not to exceed $4,000 for the erection of a schoolhouse, and stated the manner of voting on the proposition. The ballot to be used followed the notice, except that it omitted the limit of the amount of bonds that might be issued. It was held that the ballot was a sufficient compliance with the law which provided for submitting the question to be voted on.

In *Wightman v. Village of Tecumseh,* 157 Mich. 326, the words, "For sewer purposes," were omitted from the ballot as it was printed. In the form of the ballot it was provided that the same should contain the purpose for which the bonds were authorized; but the court held that an omission from the statement upon the ballot of the purpose for which the bonds were to be issued did not invalidate the election, as the resolution and the published notice contained a full statement of the purpose.

We are unable to discover any error which seems to us to be prejudicial. The evidence appears to fully sustain the judgment of the district court, and it is

AFFIRMED.

ROSE, J., not sitting.

FAWCETT, J.

For the reasons stated in the foregoing opinion, supplemented by the reasons assigned in the concurring opinion of SEDGWICK, J., I concur.

LETTON, J., concurs as stated by Fawcett, J.

SEDGWICK, J., concurring.

I think that the conclusion reached in the opinion of Judge Hamer is right. The relator in his brief urges six different reasons for reversing the judgment of the district court.

1. The resolution calling the election for the issuance of bonds was adopted by the votes of two of the members of

the county board, one member voting against it. Mr. Sprague, one of the members voting for it, had removed from the precinct from which he was elected to another precinct in the county, and the relator contends that he was disqualified to vote, and that therefore the resolution was not adopted. The relator cites *State v. Skirving,* 19 Neb. 497, and *State v. Field,* 26 Neb. 393. In the former case it was directly held that a county commissioner must reside in the precinct from which he was elected. The commissioner had removed to another precinct, and at the next general election it was insisted by all parties that a successor should be elected. The candidates were regularly nominated, and the relator in that case was elected. He brought an action in *quo warranto* to test his right to the office. The court held that he was entitled to the office. This holding was approved without comment in the latter case. In the case at bar no one contested Mr. Sprague's right to the office, and he continued to act in that capacity without objection. His actions therefore were entitled to the force and effect of the act of an officer *de facto.*

2. The second point urged is that the notice of the election was defective. In this contention the relator disregards the first publication, in which the whole proceedings of the county board were published, including the matters which he insists were not properly published. When we remember that the respondent, as auditor of state, was not restrained from proceeding with the registering of the bonds, and that the bonds have accordingly been duly registered and sold and the proceeds received by the county, and that this relator has no special interest in the matter, it must be held that the first publication was not invalid because it included the whole minutes of the county board.

3. It is objected that there were two propositions submitted, and that under the law they should have been submitted separately. The purpose of the bonds was stated, "for the purpose of erecting a courthouse and jail building in said county," and in another place, "for building and furnishing a courthouse building and jail building." It

seems to be contended that this contemplated two buildings; but there is no allegation that it was so considered by the board, or that any one was misled in that respect. The building contemplated was for a courthouse and jail, and I think that this objection was without merit.

4. It is also contended that the county commissioners were without authority to issue bonds for furnishing the building. The notice recited that it was "for the purpose of purchasing material for the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building for said county." In *Linn v. City of Omaha*, 76 Neb. 552, it was held that the authority to issue bonds for the construction or purchase of needful buildings for the use of the city included the power to purchase the site for such buildings; and in *Champion Iron Co. v. City of South Omaha*, 93 Neb. 56, it was held that the installation of cells in the city hall to be used in connection with the police court was authorized by a vote to purchase a site and erect a city hall thereon. A courthouse and jail would be useless without proper furnishing, and such furnishing must be considered as a part of the building itself, within the contemplation of the statute.

5. Various discrepancies in the language used for stating the purpose of the issue of the bonds are discussed in the brief; but in view of the facts before stated, that the relator has no special interest in the matter, and that the proceeds of the bonds have already been appropriated, I would not consider it necessary to discuss these verbal discrepancies.

6. Lastly, it is contended that the trial court should have required the auditor to examine the authenticity of the history of the bonds. The law makes it his duty to examine the history of the bonds, and the court properly presumed that the auditor had done so.

For the foregoing reasons, I think that the conclusion affirming the judgment of the district court is correct.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1915.

ALVARADO W. CRAIG, ADMINISTRATOR, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL., APPELLANTS.

FILED JANUARY 6, 1915. No. 17,876.

1. **Negligence.** Upon the questions of negligence and contributory negligence, *Craig v. Chicago, St. P., M. & O. R. Co.*, *ante*, p. 426, followed.
2. ———: IMPUTED NEGLIGENCE. The mere fact that the relationship between the driver of a wagon and the person riding therein is that of mother and son does not, of itself, as a matter of law, make the negligence of the driver imputable to the mother.
3. ———: ———: QUESTION FOR JURY. Where it is contended that a son whose negligence contributed to the injury was his mother's agent or servant, so that his negligence is imputable to her, and the evidence is conflicting, the question is for the jury.
4. **Action for Death:** COUNTERCLAIM. A counterclaim for damages for injury to the rolling stock and roadbed of the defendant railway company, caused by the negligent act of the driver of a vehicle, cannot be asserted against the beneficiaries of an action under Lord Campbell's Act.
5. **Damages.** Evidence examined, and a verdict of $10,000 for the death of the plaintiff's decedent *held* not to be so excessive as to justify setting it aside as the result of passion or prejudice.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

George W. Peterson, Brome & Brome and *James B. Sheean,* for appellants.

Sullivan & Rait and *W. T. Thompson,* contra.

LETTON, J.

This action is brought by the administrator of the estate of Catherine E. Craig, for the benefit of himself and the next of kin, to recover damages for the death of his wife. Judgment was rendered in his favor for $10,000. Defendant appeals.

The principal facts with relation to the accident whereby Mrs. Craig lost her life are set out at length in the opinion in the case of *Craig v. Chicago, St. P., M. & O. R. Co., ante,* p. 426. It will be unnecessary, therefore, to consider the claim of defendant that the evidence does not support a finding that it was guilty of negligence, that point having been decided adversely to its contention in the former case. We adhere, also, to the view expressed as to the defense of contributory negligence with respect to Zell Craig. Defendant contends that the negligence of Zell Craig must, as a matter of law, be imputed to Catherine Craig, and that, if this claim is decided adversely, then the damages awarded are so excessive as to have been the result of passion and prejudice on the part of the jury. In both cases defendant asserts that the court erred in not receiving evidence in support of its counterclaim for damages to its engine, train and track resulting from the derailment caused by the collision. The latter point was not considered in the other case, but will be considered briefly here.

Even if a tort could be offset against a tort, such a counterclaim as this cannot be asserted.

The plaintiff is suing in his representative capacity as a trustee. The action is not brought for the benefit of the estate of the deceased, nor can the amount, if any, recovered be made subject to any claims of creditors. The cause of action is one created by statute. Its purpose is to prevent those persons who had the right to look forward

to the services of, or support from, the deceased, and who will suffer a pecuniary loss by the death, from being deprived thereof by the wrongful act of the defendant. If Zell Craig, as the agent or servant of Alvarado W. Craig in the driving of his team, recklessly and carelessly caused injury and damage to another, under the doctrine of *respondeat superior,* Alvarado W. Craig might be liable personally, but he could not be liable in a representative capacity. In such a case, if Zell Craig were the agent or servant of the mother, whether her estate could be reached or not, the fund created for the benefit of her heirs and next of kin could not be touched. The court, therefore, properly rejected this evidence.

Upon the question of imputed negligence, the court gave the following instructions:

"(6) If you find from the evidence that Zell Craig was on the day of the accident sent to Lyons by his father, on his father's business, driving his father's team, and that Catherine E. Craig went on business of her own, without any authority or duty with respect to the driving of the team, and without any reason to suspect the want of care or skill on the part of her son, then and in that case, his negligence, if any there was, could not be charged or imputed to her, and the relation of mother and son would not alone and of itself afford a necessary inference that she possessed the right, or was charged with the duty, to control or direct the driving of the team.

"(7) When a passenger, while riding in a private vehicle with the consent of the driver or owner thereof, is injured by the concurring negligence of the driver and another, the negligence of the driver is not imputed to the passenger, so as to prevent a recovery of damages for the injury sustained, unless he had authority to control, or was charged with a duty to control, such driver, or had reason to suspect a want of care or skill on his part. Applying this principle to the case in hand, you are instructed that the negligence of Zell Craig, if any there was, contributing to the accident in question, cannot be charged or imputed to Catherine E. Craig, so as to prevent a re-

covery in this case, unless she possessed the right, or was charged with the duty, to control such driver, or had reason to believe or suspect that there was a want of care or skill on his part."

The complaint is made that "the rule of law thus announced is not applicable to the undisputed facts, and is erroneous." It is also stated that the mother gave the directions as to the grist and the manner in which the corn should be ground, and it is argued that the business at the mill was a joint enterprise for the benefit of the family, but, even if it was not so, that, in the absence of the father, Mrs. Craig was the master or principal and the son was her servant or agent.

The doctrine of imputed negligence has been considered in this state in the cases of *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627, *Loso v. Lancaster County,* 77 Neb. 466, and *Hajsek v. Chicago, B. & Q. R. Co.,* 68 Neb. 539. The holding in the *Talbot* case is modified by the *Loso* case. It was held in the *Hajsek* case: "Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." This is the rule adopted by nearly every state in the Union. *Loso v. Lancaster County, supra.* If there is any doubt or question as to the nature of the relation existing between Mrs. Craig and her son with respect to the management of the team at the time the accident happened, the question is one of fact for the jury. So far as the evidence shows in this case, Mr. Craig was the owner of the farm and carried on the farming operations. It was at his direction that the son went to the mill, it was his team and wagon that was used, and the grist that was to be ground belonged to him. It is true that the miller asked Mrs. Craig how she would like the meal ground, and, housewife like, she indicated her preference; but this does not indicate that the corn was not the property of her husband. Mrs. Craig had not driven a team for ten years. There is nothing to show that she was invested with any authority over her son with respect to the management of the journey. The son went to town up-

on the father's business, and it is shown that the mother desired to go in order to exchange a pair of shoes for a better fitting pair. We cannot say, as a matter of law, that the relation of principal and agent, or master and servant, existed between the mother and son, even though the young man had not arrived at his majority. The son only lacked a month of being 18 years old. He weighed 183 pounds, and was a man in all but years. It has been held that, where a person is a passenger or a guest in a vehicle and it becomes apparent that the driver is taking unusual risks, if the passenger or guest makes no attempt to leave the vehicle or save himself from the threatened injury, he is equally guilty of negligence and cannot recover. *Rebillard v. Minneapolis, St. P. & S. S. M. R. Co.*, 216 Fed. 503, and many cases cited in the opinion; *Trumbower v. Lehigh Valley Transit Co.*, 235 Pa. St. 397. But, in this case there is evidence that, as soon as the young man apparently saw the train and commenced to whip the horses, the mother attempted to seize his arm or the reins, seemingly in the endeavor to prevent the team from crossing the track in front of the locomotive. May not the converse of the proposition apply, and, if the guest or passenger attempts to thwart the negligent act, is this not strong or conclusive evidence that no negligence existed on his part or should be imputed to him?

The relation of parent and child is not the determining factor. *Johnson v. City of St. Joseph*, 96 Mo. App. 663, was a case in which the driver of a wagon in which the plaintiff was riding, which was precipitated into an excavation in a defective street, was her son. It was held that, as it did not appear that the son was in her employment, his negligence could not be imputed to plaintiff, citing *Dickson v. Missouri P. R. Co.*, 104 Mo. 491. In *Buckler v. City of Newman*, 116 Ill. App. 546, the facts were that the plaintiff was riding in a wagon drawn by a team of horses driven by her son, aged 17 years. The wagon wheel dropped into a defect in the highway. As a result the plaintiff was thrown to the ground and injured. The jury were instructed that, if the accident "resulted from a want

of reasonable care and caution for her own safety on the part of the plaintiff, *or the person driving the team,* then the jury should find in favor of the defendant." The court said: "It cannot be said, as a matter of law, that the mere fact that he was her son and a minor gave her such control over him as to make her responsible for his careless driving. The record fails to disclose the ownership of the team and wagon, whether the driver was in her or her husband's employ, or whether she was a passenger by right of ownership of the team and wagon or by invitation or permission of the owner. As we take it, the mere relation of parent and child is not sufficient, but before the negligence of the driver could be imputed to appellant, the relation of either master and servant, or of principal and agent, must have been established." The judgment was reversed. *Peabody v. Haverhill, G. & D. Street R. Co.,* 200 Mass. 277, and cases cited in the opinion.

It is strongly urged that the court erred in permitting the plaintiff to testify as to the value of his wife's services. Mr. Craig testified that his oldest daughter was 20 years of age when the accident happened; that she has since married and moved to Colorado; that the surviving son is not quite 16, and that his daughter Ilene is not quite 14 at the present time. Mrs. Craig was 52 years old and in good health at the time of the accident. They had been married 22 years. She did all the housework, with the help of the girls when they were not at school, made the children's clothes, did the washing, and took care of the milk and butter and poultry. She also instructed the children and helped them with their lessons in school and Sunday school. After giving these facts, the witness was asked what, aside from the care of the children, the value of her services was for taking care of the house, caring for the poultry, making butter, etc. This was objected to because no foundation was laid. The objection was overruled. Mr. Craig then testified that her services were worth about two or three times as much as those of a servant girl to whom you would have to pay $5 to $10 a week, and worth at least $15 a week. We find nothing

prejudicially erroneous in the admission of this evidence. The evidence is not strictly that of an expert. The wages of domestic servants is a matter of common knowledge, and the facts in evidence with reference to the services of Mrs. Craig as housekeeper and in the care and instruction of the children justify the conclusion testified to by her husband.

It is next urged that the verdict is so excessive that it appears to have been the result of passion or prejudice on the part of the jury. No tables of expectancy are in the record, but, according to the brief of both parties, the expectancy of Mrs. Craig was between 19 and 20 years. Assuming as a basis of calculation that her services were worth at the minimum $15 a week or $780 a year, and taking the present value of that sum for the period of expectancy, with interest for the time intervening between the commencement of the suit and the rendition of the verdict, this amounts to about $8,900. Plaintiff urges that this is the minimum value of the services, which the jury was not bound to adopt, and that, if the value of her services is estimated with reference to the testimony as to the wages paid a servant girl and the proof, they were worth two or three times as much, and the present worth of her services would be about $20,000. On the other hand, the defendant, upon the assumption that her services were worth $1 a day or $365 per annum, argues that the present worth would aggregate $3,733, or, if $5 a week be taken as a basis, to $5,167.50. It is impossible to ascertain with accuracy or certainty the pecuniary loss which will be suffered by the husband and children on account of the death of Mrs. Craig. Tables of expectancy show mere averages, but seem to afford as reasonable an index to longevity as has so far been discovered. The beneficiaries may all cease to exist within a year, or they may live far beyond the average duration of life. It is also impossible to place a definite money value upon the services of a wife and mother. The wages of a servant girl or a housekeeper are not always a true index of the pecuniary loss to the husband and children. If the amount fixed by the jury does not con-

vince the mind that it is unjust and entirely disproportionate to the loss suffered, courts should not, and they are loth to, interfere with verdicts. The question must be determined under the attending circumstances of each individual case. While we are satisfied that the amount assessed is fully as much as the recovery should have been, we are not convinced that it is so excessive that we are justified in setting the verdict aside as a result of passion or prejudice, or that a remittitur should be required.

We find no prejudicial error in the record. The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

BESSIE B. BORCHERT, APPELLANT, V. JAMES BASH, APPELLEE.

FILED JANUARY 6, 1915. No. 17,879.

Limitation of Actions: ASSAULT AND BATTERY. A civil action for damages for an assault and battery with circumstances of aggravation must, under section 13 of the code, be begun within one year after the cause of action accrued.

APPEAL from the district court for Dundy county: ERNEST B. PERRY, JUDGE. *Affirmed*

C. E. Eldred and *A. T. Cowings,* for appellant.

Bernard McNeny, contra.

LETTON, J.

This is a civil action for assault and battery. It is charged that the defendant assaulted the plaintiff and attempted to have carnal intercourse with her against her will and without her consent by forcibly overcoming her resistance, but that the plaintiff by exercising her strength

succeeded in releasing herself. The assault is alleged to have occurred on the 6th day of March, 1911. The action was begun on the 23d of September, 1912. The defendant filed a general demurrer, on the ground that the plaintiff's cause of action was barred by the statute of limitations. The demurrer was sustained, and, the plaintiff having elected to stand upon her petition, a judgment of dismissal was entered. Plaintiff appeals.

The question to determine is whether the action is one for assault and battery, which by section 13 of the code, must be brought within one year, or whether it is "an action for an injury to the rights of plaintiff, not arising on contract, and *not hereinafter enumerated,*" which, under section 12, is not barred until four years after the wrong. The appellant's position is that the petition charges a felonious assault, and that felonious assaults are not within the definition of assault and battery, and, hence, must be covered by the provision of section 12. It is a settled doctrine of statutory construction that words shall be taken to have their ordinary and customary meaning. The question, then, is, for what classes of wrongs has it been generally understood, both in England and in this country, can damages be recovered in civil actions for assault and battery?

At the common law the action for every wrong of this nature was trespass, *vi et armis,* for assault and battery. *Dickey v. McDonnell,* 41 Ill. 62; *Agnew v. Jobson,* 13 Cox C. C. (Eng.) 625.

In *Elliott v. Van Buren,* 33 Mich. 49, 20 Am. Rep. 668, it is said: "This action is nothing more than trespass for an assault and battery. There is no such thing as a private action for a crime as such. The civil grievance here charged was an assault, described, as was proper, with its attendant circumstances of enormity, including an attempt to ravish. This, however, does not make it differ from an action for a lighter grievance, except as showing a heavier ground of complaint, for which, if made out, the damages allowed would be likely to be larger."

It is unnecessary, in order to make out a cause of action, to plead matters of aggravation, since their effect is merely to increase the damages (3 Cyc. 1082*h*); and the contention that, because the assault is alleged to have been accompanied by aggravated circumstances, the nature of the action is changed from a civil action of assault and battery, we think, is untenable. It is the same action, but the damages may be enhanced by the nature of the assault.

The books are full of reports of civil actions for indecent assaults of this nature, extending over a period of many years. They are uniformly classed at common law as actions in trespass, *vi et armis,* for assault and battery, and in code states as actions for assault and battery. The following illustrative cases are concerned with like assaults. Each is denominated an action for assault and battery. *Luttermann v. Romey,* 143 Ia. 233; *Haulish v. Boller,* 75 N. Y. Supp. 992; *Derwin v. Parsons,* 52 Mich. 425; *Parker v. Coture,* 63 Vt. 155. See, also, 1 Kinkead, Commentaries on Torts, sec. 206.

In Ohio, from which state our code was taken, there seems to have been no doubt as to the nature of an action for such an assault; and, in the absence of a disability on the part of the plaintiff (such as infancy), it must be brought within one year. *Bormuth v. Beyer,* 10 Ohio C. C. 291.

It is significant that libel, slander, assault and battery, malicious prosecution, and false imprisonment—all personal wrongs—are included in the one year statute. The legislature evidently thought that the public interest requires a prompt prosecution of such actions. Charges of this nature are easily made and difficult to defend against, and the lapse of more than one year after the alleged occurrence of the wrong allows time for the dispersion of witnesses, and makes the difficulty of defending such cases much greater. In *Kramer v. Weigand,* 91 Neb. 47, which plaintiff cites, it is said, speaking of the common law: "Damages for assault and battery were recoverable in a civil action, but damages for rape were not, and where rape was part of the violence proved there could be no

recovery for assault and battery. * * * This difference between the nature of the offenses was evidently observed by the legislature when the statute of limitations was enacted." That case, therefore, furnishes no basis for plaintiff's contention.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

The opinion of the majority approves of *Kramer v. Weigand*, 91 Neb. 47, and professes to distinguish it from this case. In each case the action is for damages caused by a felony committed against the plaintiff. In each case the felony complained of included an assault and battery, and neither felony could be committed without committing an assault and battery. In the case at bar the struggle was more strenuous, and the plaintiff succeeded in preventing the consummation of the rape. In the *Weigand* case the resistance was not so determined and successful. In the case at bar, if the plaintiff had been more yielding and had not resisted so strenuously, she would have had four years in which to begin her action. By her stubbornness she forfeited that right, and must suffer her injuries without redress because she did not begin her action within one year after the felony was committed against her. Could anything be more inconsistent? The explanation given in the majority opinion for such distinction is, to my mind, still more curious. It is said: "Damages for assault and battery were (at common law) recoverable in a civil action, but damages for rape were not, and where rape was part of the violence proved there could be no recovery for assault and battery. * * * This difference between the nature of the offenses was evidently observed by the legislature when the statute of limitations was enacted." If this statement has any application in the *Weigand* case, it has the same application in the case at bar, but it has no application in either case. Several hundred years ago in England all damages caused by any felony belonged to the King. There could be no private action for damages

caused by a felony. They said the damages were included in the crime. If that were the law with us, it would of course apply to one felony as well as another, and would not distinguish the case at bar from the *Weigand* case. But there never was any such common law in this state. At the earliest opportunity a right of action was given for all felonies, and no distinction was made. "The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of and in addition to the punishment of the latter." 1 Complete Session Laws, p. 351. The first territorial legislature of 1855 enacted a criminal and civil code. It defined the crime of assault, assault and battery, rape, and assault with attempt to commit rape. 1 Complete Session Laws, p. 96. It adopted a part of the Iowa civil code, which contained the statute of limitations. It contained no provision specially limiting the time for bringing actions for assault or assault and battery, but actions for injuries to the person were limited to two years. 1 Complete Session Laws, p. 25. Later the limitation for actions for injuries to the person was extended to four years, and this limitation was made to apply to all actions for injuries to the person "not hereinafter enumerated," and a subsequent section provided the limitation for action for assault and battery should be one year. It would seem very clear that under these statutes we ought to hold, either that all actions for damages caused by a felony committed against the person are actions for simple assault and battery and must be brought within one year, or else that all such actions have a four-year limitation. The majority opinion says: "At the common law the action for every wrong of this nature was trespass, *vi et armis,* for assault and battery. * * * And the contention that, because the assault is alleged to have been accompanied by aggravated circumstances, the nature of the action is changed from a civil action of assault and battery, we think, is untenable. It is the same action, but the damages may be enhanced by the nature of the assault." That is, if an assault and battery is included in the act complained of, all consequences of the assault and

battery are matters in aggravation of damages and cannot change the nature of the action. This would, of course, include an accomplished rape and all possible consequences thereof, and as plainly includes the *Weigand* case as it does the case at bar. The opinion in the *Weigand* case begins with the statement: "Plaintiff is an unmarried woman, and this is an action for trespass upon her person." Of course that correctly states the nature of the case. There can be no rape without an assault and violence against the person. The petition in that case alleged that "the defendant with force and violence made indecent assault upon the plaintiff," and the evidence tended to prove the allegation. The petition alleged, and the evidence tended to prove, serious consequences of the assault. It was an aggravated assault. The plaintiff did not resist so successfully as in the case at bar, and the consequences were different, but both were felonies and both were followed by consequences that might be anticipated from the nature of the assault.

The majority opinion cites *Luttermann v. Romey,* 143 Ia. 233, and other similar cases. These cases have no relation to the question we are deciding. The action was for an aggravated assault. The plaintiff failed to prove those elements of the offense which under our statute would constitute a felony. It does not appear from the opinion whether the offense charged was a felony under the Iowa statute. The decision was that, if plaintiff failed to prove the more serious crime, she might still recover for the assault. The assault was necessarily included in the charge, as in the case at bar and in the *Weigand* case, and, of course, a recovery for an assault could not be denied because the plaintiff failed to prove the felony. In construing a statute words should be taken to have their ordinary meaning, and it is unfortunate to give a strained and unnatural meaning to the language of a statute upon an erroneous idea of the common law of England of hundreds of years ago. This is especially so when the result is to construe a statute in one case, and give it an exactly

contrary construction in the next case which involves the same question.

JOHN L. NOFSINGER, APPELLANT, V. ALFRED D. PAUP, APPELLEE.

FILED JANUARY 29, 1915. No. 17,745.

1. **Assault and Battery:** RIGHT TO RECOVER. The plaintiff, in an action for damages for an assault and battery, cannot recover when he is shown to have been the aggressor, unless the defendant, in repelling the plaintiff's assault, has used more force than would appear necessary to an ordinarily prudent man under like circumstances.
2. **Appeal:** AFFIRMANCE. This court will not set aside the verdict of a jury as unsupported by the evidence, unless it is clearly wrong.

REHEARING of case reported in 96 Neb. 805. *Former judgment of reversal set aside, and judgment of district court affirmed.*

BARNES, J.

This was an action to recover for personal injuries sustained by the plaintiff for an assault and battery alleged to have been committed by the defendant. The defendant's answer was a denial and a plea of self-defense. By a former opinion (*Nofsinger v. Paup,* 96 Neb. 805), we held that the evidence was insufficient to sustain the verdict in favor of the defendant. A rehearing was allowed, the cause has been reargued and submitted, and the question now is: Shall we adhere to our former opinion?

It appears that on the 24th day of May, 1911, the plaintiff started from his home with a load of wheat to be delivered at Albion, which place lies about seven miles northeast of the plaintiff's premises. At the corner of the defendant's farm a boy named Adam Gardner got upon the wagon and rode with plaintiff to a point where the difficulty occurred. The plaintiff testified, in substance, as follows: I had

stopped about five times from the Paup corner to the hill, about 25 or 30 rods south of the Gardner place. I stopped at the bottom of the hill. I then made a pull and stopped perhaps 50 feet up the hill. I raised up to get off my wagon to start my team. While doing that I said: "They are playing thunder with these confounded drags." When I looked back I saw Mr. Paup with his spade up ready to strike. He was close to the east of his horses' heads, about eight feet from me. When I dropped my lines I turned, facing him. I came within about four feet diagonally northeast from the hub of my wheel. Paup said: "If you come an inch I will hit you with this spade." I was holding up my right hand to keep him from hitting me. I begged him not to hit me with the spade. He said: "I will hit you with the spade; I will hit you with the spade." And he said some foul words as he struck me. He said: "I will just kill you." There was scarcely a check from the first words spoken until I was hit.

The testimony of the defendant, relating to the commencement of the affray, was, in substance, as follows: On the morning of May 24, I went out and King-dragged the road. I noticed plaintiff's team over the hill. I knew he was prejudiced against us working the road. I did not want to meet him. I waited until he went north of the corner, about 40 rods from where I was. When I got on top of the hill he was about 60 rods ahead of me. When I saw him next he was about 30 rods ahead of me. When I got down there the horses began to slow up, and I looked up and said, "Whoa," and they stopped, and there was Mr. Nofsinger's team standing in the road. He turned round in the seat and said: "What in the devil do you want to be dragging these roads for all the time?" I finally says: "What's biting you?" He said: "There is a whole lot biting me." He climbed off the wagon with the whip in his hand and started toward me. I waited until he got back of the back end of his wagon, and he kept coming, and I waited until he got pretty near to the head of my horses, and I saw that he was going to come, and I had this shovel on there, and I picked it up and

warned him to stand back. I told him not to come any farther. He was then about 10 feet from me. I said: "Stand back or I will hit you." He was in front of me watching me, and I was looking at him. I warned him the second time. He kept crowding in on me. I warned him the third time to stand back, and he kept crowding up on me, and when I warned him the third time he made a rush at me like that, and I struck him with the spade. I do not know whether I hit him with the spade, or whether the spade came off and hit him, but anyway he rushed into me and commenced pounding me with the butt end of the whip, and he struck me across the face and over the head and kind of dazed me, and when I came to he had his thumb in my eye trying to gouge my eye out, and I jerked away from him and got my thumb in his mouth, and he bit me on the thumb, and I jerked away from him, and in some way or other I was trying to push him from me, and I got him by the shirt, and in the tussle I threw him down and was holding him down. He said: "You ought to be ashamed of yourself to hit an old man 52 years old." And I said: "You ought to keep a 52-year old man's place."

Adam Gardner, who was the only other witness who saw the encounter, testified, in substance, as follows: I was riding with Mr. Nofsinger. He had stopped his team there, and Paup came up behind him. Nofsinger used a vulgar and profane expression, and then said: "What are you always dragging up my tracks for?" Paup said: "What's biting you?" And Nofsinger went off his wagon with his whip in his hand and went back to him. Paup said: "Stand back or I will hit you." And he said: "I will dare you to hit me with the spade." Mr. Paup said three times, "Stand back." Nofsinger went right toward him, and he hit him over the head with the spade. Nofsinger fell and clinched Mr. Paup. That is all I saw, and I went into the house. Nofsinger was holding his hand up to his face. He had a broken-off piece of buggy whip three or four feet long in his hand. Paup moved

backward. They were 10 or 15 feet back of the hind wheel when the blow was struck with the spade.

The foregoing is the substance of the testimony describing how the encounter between the plaintiff and defendant took place. There was considerable other testimony, and the statements of the witnesses named were to some extent modified by cross-examination, but the above is a fair statement of what the testimony shows.

It must be conceded that Nofsinger was quite severely injured by the blow struck with the spade. His other injuries were comparatively slight. The defendant was also injured in the fight, but his injuries were not permanent. The case was submitted to the jury under proper instructions. In fact, the trial court submitted nearly all of the instructions requested by the plaintiff. Some of them were slightly modified, but, as we view the record, the modifications were properly made. The jury returned a verdict for the defendant, on which the trial court rendered judgment. By a reference to the testimony, it is apparent that the jury were of the opinion that the plaintiff was the aggressor, and that the defendant struck him in self-defense. If this was so, plaintiff could not recover, unless the defendant used more force than, under the circumstances, an ordinarily prudent man would be justified in believing was necessary to repel the assault, and the jury were apparently convinced that the force used by defendant was justifiable. We are unable to say that the jury were not justified in arriving at that conclusion.

Where a question is submitted to the jury upon conflicting evidence and upon proper instructions, the verdict will not be set aside by a reviewing court, unless it is clearly wrong. The evidence was substantially conflicting, and in such case the verdict of a jury should not be set aside on the ground of its being against the weight of evidence, unless it is clearly so, and more especially ought this rule to be observed by reviewing courts. Considering the charge to the jury as a whole, we find no prejudicial error in the instructions.

It follows that our former judgment should be, and is, set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., not sitting.

HAMER, J., dissenting.

Paup was driving a team behind Nofsinger and overtook him. Both Nofsinger and Paup agree that Paup said to Nofsinger, "What's biting you?" Nofsinger testified that he said to Paup, "There is nothing biting me," that at the time he said this he thought his team was stuck. The ground was soft. Nofsinger further testified that when he first stepped off the wagon he was about even with the hind edge of the front wheel; that when he looked back "he saw Mr. Paup with his spade up ready to strike." He puts Paup about eight feet distant from him, and says that he (Nofsinger) dropped his lines and turned to face Paup; that Paup said to him, "If you come an inch I will hit you with this spade;" that he (Nofsinger) begged Paup not to hit him with the spade; that Paup said, "I will hit you with the spade; I will hit you with the spade;" that he said some foul words and wound up by saying, "I will just kill you."

Paup was 10 years younger than Nofsinger. Nofsinger complained because Paup struck a man who was older than he was. Paup himself testified: "I got him by the shirt, and in the tussle I threw him down and was holding him down." As long as Paup was 10 years younger and was able to throw him down, there does not seem to have been any necessity for striking him with the spade. Nofsinger had a 35-cent buggy whip. It could not have been of much force as a weapon.

Paup opened his defense with the statement that he had "grippe" and heart trouble and a bad cough. He testified he was uncertain whether he hit Nofsinger "with the spade, or whether the spade came off and hit him." The boy testified that Paup said to Nofsinger, "Stand back;" that Paup then went right toward him, and he hit him over

the head with it. Paup appears to have told Nofsinger, "You ought to keep a 52-year old man's place." The fact is uncontroverted that Paup hit Nofsinger with the spade. With its sharp edge he cut Nofsinger's head.

The defense in this case is, to the mind of the writer, very much of a sham. While it is for a jury to determine the merits of conflicting evidence, the jury has no right to render a verdict that is not sustained by the evidence. The defendant very seriously injured the plaintiff. I have been wholly unable to find any justification for his conduct. I thing he ought to pay for it.

Dr. Thompson testified that Nofsinger was "in a condition of shock and collapse; he was quite pale and very nervous; there was some blood on his face and head, and on the scalp here on the right side, a little to the right of the middle line, there was a cut which by measurement was three inches in length, reaching through the entire thickness of the scalp, to the bone, and some bruises or abrasions on his face and neck." The doctor also testified that he put "five stitches in the scalp wound." Later there was a partial paralysis of the left leg. Nofsinger's speech became incoherent and broken. His bladder was affected, and he was unable to retain his urine. His injuries seem to have been permanent.

The court gave the following instructions upon its own motion:

"(4) The fact that defendant struck plaintiff a blow on the head with a spade is not controverted by the proofs, hence there are but two questions left for your determination, viz.: First. Was said blow struck in self-defense as hereinafter explained? And, second, if you determine such fact in the negative, then you are to determine whether the plaintiff has sustained damages by reason thereof, and, if so, the amount of such damage.

"(5) Upon the question as to whether said blow was struck in self-defense, the burden of proof is upon the defendant, and, to justify you in so finding, the jury should be satisfied, from a preponderance of the evidence, that the blow was struck in self-defense. If upon this question the

evidence is evenly balanced, or if it preponderates in favor of the plaintiff, your finding should be for the plaintiff."

The foregoing instructions seem to relate to each other. These instructions may be criticized because they lay down no rule of any kind by which the jury are instructed as to what is "self-defense." They are left to roam at will. If they conclude that the blow was struck in self-defense, there is nothing more to be done, although they are not told what will justify the striking. The jury are left to determine the law upon this subject for themselves.

The 6th instruction reads: "Upon the question as to whether the plaintiff has sustained damages by reason of the blow struck by defendant, and as to the amount of such damages, if any you shall find, the burden of proof is upon the plaintiff; and before you would be justified in assessing damages in his favor you must be satisfied from the evidence, and by a preponderance thereof, that he has sustained damages in some amount, as a result of said blow, and you must be further satisfied, as explained in the next preceding paragraph of these instructions, that said blow was not struck in self-defense."

This instruction permits the jury to tide over any amount of injury by coming to the conclusion that the blow might have been struck in self-defense. It tethers them nowhere. The judge in effect tells the jury that Paup had a right to cut his head with the spade, provided he thought that he was acting in self-defense.

Instruction No. 9½ would seem to be a license to the defendant upon the theory that his physical condition was not good. This instruction substantially told the jury that they could "take into account his physical condition" (meaning the defendant's physical condition) and compare it with that of the plaintiff, although there was no testimony whatever upon which to base such a comparison. This instruction must have been highly prejudicial. It is indefensible. It reads: "In the determination of the question whether the defendant used unreasonable force or means to defend himself, it is proper for you to take into account his physical condition,

as disclosed by the evidence at the time, and as compared with that of the plaintiff."

The following instruction requested by plaintiff was refused: "(1) You are instructed that this action has no relation whatever to any other action or litigation, and you are instructed that you must disregard any reference to any former action." It is difficult to understand upon what ground this action was taken.

The court also refused to give the following instruction requested by the plaintiff: "(3) The jury are instructed that, if they find for the plaintiff, then, in assessing his damages, they are at liberty to take into account the character and extent of plaintiff's injuries, so far as they have been proved by the evidence, the pain and suffering endured by him, if any, in consequence of such injury, his loss of time and cost of medical attendance, and award such damages as will fully and fairly compensate the plaintiff for his suffering and loss, if any, in view of all the facts and circumstances proved, not exceeding the sum of $11,500." It would seem that an instruction of this nature should have been given.

Instruction No. 6, requested by the plaintiff and refused, reads as follows: "The court instructs the jury that, if you find from a preponderance of the evidence that at the time of the encounter the plaintiff and defendant were men of about equal size, that they occupied common ground, that the plaintiff had no apparent advantage over the defendant, that the plaintiff was not armed with any dangerous or deadly weapon with which he might have killed or seriously injured the defendant, and that the plaintiff, prior to the time of being struck on the head with a spade by defendant, had made or uttered no threat against the defendant, nor made any effort to strike or injure the defendant, under such circumstances the action of the defendant in striking plaintiff with the spade is wholly without justification in law, and his plea of self-defense is of no avail."

Instruction No. 15, requested by the plaintiff and refused, reads: "You are instructed that, if a party enters

into a fight dangerously armed and fights with undue advantage over his antagonist, even though mutual blows pass, if he strikes his adversary with a dangerous weapon pursuant to a previously formed design to use such weapon in case of emergency in which his life would not be endangered, or he would not be in danger of suffering great bodily injury, it is not self-defense, and he is liable in damages."

Instruction No. 16, requested by the plaintiff and refused, reads: "You are instructed, to make a plea of self-defense available, the defendant must be without fault. If he was himself the aggressor, he cannot invoke the doctrine of self-defense, even if the plaintiff was approaching him in a hostile manner; and whether the necessity to strike the plaintiff was real or only apparent, if brought about by the design, contrivance or fault of the defendant, he cannot be excused on the plea of self-defense."

It should be remembered that an impartial consideration of the evidence in this case might lead to the conclusion that these men fought by consent. While the plaintiff may have been willing to fight, he was not armed with a dangerous weapon. He had a little broken buggy whip. He could not have seriously injured the defendant. The defendant was armed with a spade. In law a spade is a deadly weapon. It is as dangerous as a dagger, a revolver, or a cleaver. The language used by the trial court in instructing the jury was such as to confuse their ideas concerning the matter.

The first point to determine is which of the parties was the aggressor, or whether the plaintiff attempted any thing more than mere talk. In this connection it should not be lost sight of that the defendant was in no great danger if the plaintiff did not attempt to strike him. He could not jump to the conclusion that he was going to be struck until there was an actual demonstration of some kind. Second, he was in no danger as long as the plaintiff had in his hand an insignificant little whip. No mere threat justified the use of the spade, if the plaintiff stood away and talked. Even though he had the whip, there was no justification

in the defendant using the spade. Before using the spade the defendant was bound to retreat to the wall; that is, he was bound to avail himself of any apparent and reasonable avenue of escape. He was not permitted to make a chopping block of the plaintiff because the plaintiff seemed to be out of humor.

At the request of the defendant the court gave four instructions, calculated apparently to excuse the defendant for using the spade. Much time and care were no doubt expended by defendant's counsel in the construction of these instructions. Their effect was to tell the jury to excuse the defendant for what he did. In three of these instructions they excuse him for using a great degree of force. Three of these instructions came right along one after another as a man might pound with a maul or sledge-hammer. They all hit the same place, the wedge, intended to divide the plaintiff from any chance to recover. The three of them which we intend to discuss together read:

"(1) You are instructed that when a person is attacked by another in such manner as to excite in him a reasonable belief that he is in danger of receiving serious bodily injury, or that he will sustain thereby serious loss or damage to his property, he may lawfully resist the attack by employing such reasonable means within his power as are apparently necessary to defend himself and protect his property. He is not required to weigh or measure the degree of force necessary to that end to a nicety or with exactitude; all that is required of him in that respect is that he act as a man of ordinary care and prudence, situated as he was at the time, would have acted.

"(2) You are instructed that, while the law will not justify the use of more force than is reasonably necessary to repel an attack, still it does make a reasonable allowance for the infirmity of human judgment under the influence of sudden passion, provocation, or fear, and does not require a man to reason with mathematical exactness the degree of force necessary to repel an attack upon himself.

"(3) You are instructed that, when a person is threatened with an assault upon himself, he has a right to defend against the same, and to use such force as, in view of all the circumstances, is reasonably necessary to that end. He is not required to weigh and calculate to a nicety the exact amount of force to use, but merely to use such care and caution as a reasonably careful and prudent man in like circumstances would use."

The first idea in the first of the above instructions is that the defendant is permitted to exercise a "reasonable belief" of danger. If he had such belief, which an angry man could easily have, then he is at liberty to use the spade on the plaintiff's head. The second idea in that instruction is that he is made the judge of what is "reasonable means" and "apparently necessary" to defend himself. Then comes the part which cannot help releasing the defendant from liability in the minds of the jury. The jury are told that the defendant may make a mistake about it and may use more force than is necessary, but it will still be all right. The actual language used is: "He is not required to weigh or measure the degree of force necessary to that end (protection) *to a nicety or with exactitude.*" In the next instruction the judge still whacks away on the question of "exactness" not being required to measure the force necessary. He first says that, "while the law will not justify the use of more force than is reasonably necessary," yet it will make "a reasonable allowance for the infirmity of human judgment under the influence of sudden passion, provocation, or fear." Was ever a thing better devised than that to excuse the violence of the defendant? But the learned judge does not stop here. He goes on to say in addition that a man, under such circumstances, is not required "to reason with mathematical exactness the degree of force necessary to repel an attack upon himself." That is the cap sheaf. I have never seen a more labored effort to justify an assaulting party than the foregoing. But he was just getting a good start, for in the third instruction the jury are told that he has

a right to defend himself when *"threatened* with an assault;" that in such case "he is not required to weigh and calculate to a nicety the exact amount of force to use." Three times in succession this matter of nicety or exactitude is gone over. Each time the jury are told "it don't make any difference."

But, fearing that he had not made it quite strong enough, the judge goes after the jury in the fourth instruction requested by the defendant. In that instruction the defendant is justified in defending himself merely if the plaintiff "approached" him. It is not required that he actually do anything in order to justify the defendant's attack with a spade. It is quite enough if the manner of the plaintiff is "menacing and threatening."

These instructions were not reviewed in the former opinion because the evidence seemed insufficient to justify the verdict.

BANK OF SALEM, APPELLEE, V. LYMAN B. CORNELL, APPELLANT.

FILED JANUARY 29, 1915. No. 17,837.

Mortgages: FORECLOSURE: APPRAISEMENT. "It is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud." *Security Investment Co. v. Sizer*, 58 Neb. 669.

APPEAL from the district court for Richardson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Burkett, Wilson & Brown and *E. Falloon*, for appellant.

C. F. Reavis, T. L. Hall and *Rinaker & Kidd, contra.*

BARNES, J.

Appeal from an order of the district court for Richardson county confirming a sale of real estate to satisfy a

decree of foreclosure. It appears that on the 24th day of February, 1911, a decree was rendered against Lyman B. Cornell in favor of the Bank of Salem for the foreclosure of its mortgage on two quarters of land situated in said county, and in favor of certain other mortgagees and lienholders, who were all made parties to the action. The decree found the several different sums due from the defendant Cornell, which were liens upon the land, amounting in all to $24,671.55. An order of sale, which contained a copy of the decree, was issued on the 2d day of February, 1912. The sale took place on the 23d day of March of that year at 10 o'clock A. M. One quarter of the land was purchased by C. M. Heinzleman and the other by one W. P. Gobel. It further appears that the two quarter sections of land were appraised separately. The quarter section about which there is no controversy was valued at the gross sum of $12,800, and the other was appraised at the gross sum of $12,000, the total gross appraised value of the land being $24,800. The appraisers deducted from the gross value of the quarter section in question the sum of $253.43, which was the amount of the unpaid taxes thereon, thus leaving the appraised value at the sum of $11,746.57, and the sheriff stated as his conclusion at the end of his appraisement that the interest of the defendant in that quarter section was nothing. After the sale was made, the defendant filed an objection to the appraisement, alleging that the land was erroneously appraised because the several mortgages and liens merged in the decree were all included in the certificate of liens and were deducted by the appraisers from the value of the interest of Cornell in the mortgaged property. When the case came on for confirmation, the defendant filed a motion, based upon his objection above mentioned, to set aside the sale. The motion was overruled and the sale was confirmed. The defendant now contends that the court erred in overruling his objections and confirming the sale.

It is quite apparent that the sheriff in making the appraisement thought that, when the several liens established by the decree were satisfied, the defendant would have no

interest in the premises, and so stated at the conclusion of the appraisement. In such case an objection to the appraisement, in order to be available, should have been filed before the sale took place. *Bernheimer v. Hamer*, 59 Neb. 733; *Northwestern Mutual Life Ins. Co. v. Marshall*, 1 Neb. (Unof.) 36; *Mills v. Hamer*, 55 Neb. 445; *Security Investment Co. v. Sizer*, 58 Neb. 669. In the case last cited it was said: "It is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud." In the case at bar there is no allegation, and no showing, of fraud. There is nothing in the record showing, or tending to show, that the land in question brought any less at the sale by reason of the irregularity in the appraisement complained of than it would have brought under other circumstances. It is conceded that the defendant's land was sold for much more than two-thirds of the gross amount of the appraisements.

As we view the record, the defendant's objections to the confirmation were without substantial merit, and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

HAMER, J., concurring.

One of the quarters of land sold was not properly appraised. The interest of the mortgage debtor was appraised at nothing. The opinion takes the view that it is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud, citing *Security Investment Co. v. Sizer*, 58 Neb. 669, and in the body of the opinion citing, also, three other cases. Whether the interest of the mortgage debtor is appraised too low ought to be the only question which can be properly raised. An appraisement which tends to drive prospective bidders away, by reason of the fact that no value is alleged, must be prejudicial to the debtor. A review of the cases in which the doctrine is announced, that objection to the appraisement must be

taken before the sale is made, shows that the doctrine in this state started with the case of *Vought v. Foxworthy*, 38 Neb. 790. The opinion in that case starts out with the statement: "It remains to be said that the value of the property, as shown by the affidavits filed in support of the motion to set the sale aside, does not so greatly exceed its appraised value as to raise a presumption of fraud." The view of the writer is that the "presumption of fraud" is an unnecessary thing to find before the sale can be set aside. If the appraisement is accidentally too low, or is for any other reason too low, then it ought to be set aside, so that prospective bidders will not be driven away. There should be no "chilled bids." In that case it is further said: "Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement before the sale occurs." It is then further said that the party seeking the sale of the appraised property would have notice, and that he could proceed to the sale of the property or take his chances of the appraisement being finally set aside, "or could stay the sale until such time as the court should decide the question as to the correctness of the appraisal made." Of course, if the mortgage debtor made an application for a "stay," he would at once waive his right of review, and that would be the end of the proceeding. The trouble with the doctrine is that the interest of the mortgage debtor gets but little consideration in this opinion. No case in this court is cited in the opinion in *Vought v. Foxworthy*. It rests upon the mere dictum of the learned commissioner, who gives no reason for his conclusion. The other cases find their support in the case of *Vought v. Foxworthy*.

The next case after *Vought v. Foxworthy*, *supra* (it is not cited in the majority opinion), is *Scottish-American Mortgage Co. v. Bigsby*, 52 Neb. 104. It gives no reason that "the objection that the appraisement was too low

came too late after the sale," except *Vought v. Foxworthy, supra.* The opinion in that case was prepared by Commissioner Ryan. Ragan goes ahead and Ryan follows him.

In *Bernheimer v. Hamer,* 59 Neb. 733 (cited in the opinion), the case of *Ecklund v. Willis,* 44 Neb. 129, is referred to as authority for that decision. On going to that case it is found that it cites *Vought v. Foxworthy, supra.* It will therefore be seen that it rests upon the original dictum of Commissioner Ragan.

In *Mills v. Hamer,* 55 Neb. 445, the same point is made, and *Vought v. Foxworthy, supra,* and *Ecklund v. Willis, supra,* are cited therein, together with *Burkett v. Clark,* 46 Neb. 466, *Kearney Land & Investment Co. v. Aspinwall,* 45 Neb. 601, and *Overall v. McShane,* 49 Neb. 64.

In *Burkett v. Clark, supra,* the original case of *Vought v. Foxworthy, supra,* is cited, and the same case is cited in *Overall v. McShane, supra.* The two former of the three cases last cited were prepared by Commissioner Ragan.

In *Northwestern Mutual Life Ins. Co. v. Marshall,* 1 Neb. (Unof.) 36, the case of *Mills v. Hamer, supra,* is cited as the basis of the opinion, and as that case rests on the case of *Vought v. Foxworthy, supra,* we go back to the original source, *Vought v. Foxworthy, supra.*

In *Security Investment Co. v. Sizer,* 58 Neb. 669, the case of *Vought v. Foxworthy, supra,* is again relied upon, together with the cases which follow it, *Burkett v. Clark, supra,* and *Kearney Land & Investment Co. v. Aspinwall, supra.*

It will thus be seen that the whole doctrine that it is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud, rests upon the dictum of one supreme court commissioner followed by the dictum of another supreme court commissioner, and after that "the sheep all went over the fence." I think that *Vought v. Foxworthy, supra,* should be overruled, but I can understand that this court may well hesitate, whatever the origin of the case, about changing a rule that has been in force 21 years. I reluctantly concur in the majority opinion in the instant

case, although, as I understand it, the rule applied started without a reason being given for its existence, and it cannot help being prejudicial to the mortgage debtor. So long as the rule stands, I am unable to see my way clearly to do otherwise than concur.

CATHERINE TIEHEN, ADMINISTRATRIX, ET AL., APPELLEES, v. SENORA C. CORNELL, APPELLANT.

FILED JANUARY 29, 1915. No. 17,906.

1. **Mortgages: FORECLOSURE: APPRAISEMENT: CONFIRMATION: REVIEW.** Where objections to an appraisement and the confirmation of sale are without merit, it is not reversible error for the trial court to strike them from the files.
2. ———: ———: **DEFICIENCY JUDGMENT.** A finding in a decree of foreclosure of the amount due from the mortgagor to the plaintiffs, who are the mortgagees, will authorize the court, on confirmation of sale, to render a deficiency judgment. *Crary v. Buck*, 1 Neb. (Unof.) 596.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Burkett, Wilson & Brown and *R. C. James*, for appellant.

John C. Mullen and *Reavis & Reavis, contra.*

BARNES, J.

Appeal from an order of the district court for Richardson county confirming a sale of real estate under a decree of foreclosure, and from the deficiency judgment rendered by the court upon the order of confirmation. No question is presented by the record challenging the validity or regularity of the decree of foreclosure, which contained a finding of the amount due from the defendant, Senora C. Cornell, to the plaintiff, Catherine Tiehen, and the cross-petitioner, the Farmers & Merchants Bank of Verdon,

Nebraska. It appears that the order of sale was issued on the 23d day of April, 1912. The sheriff, together with two other freeholders, appraised the mortgaged premises at the sum of $4,000. The sale was advertised for the 8th day of June, 1912, in the Verdon Vedette, a legal newspaper published in Richardson county, for six consecutive weeks next before the day of sale. On the day of sale the sheriff made return of the order, together with all of the proceedings thereunder, and defendant filed the following objections to the appraisement and confirmation: (1) Because no certificates of liens were filed and deposited with the appraisement before advertising the sale. (2) Because no appraisement of the interest of the defendant was made and filed with the clerk as provided by law. (3) Because the land was not advertised 30 days last before the sale took place, and was not appraised immediately before it was advertised. (4) The land was not described with clearness. The name of the plaintiff did not appear, and the purpose of the sale was not stated. The objections were not signed by the defendant; they were not signed by her attorney, but purported to be signed by L. B. Cornell as her agent. On motion of the plaintiff's attorney, the objections were stricken from the files, and the court made the usual order that cause be shown by the following morning at 9 o'clock why the sale should not be confirmed. The defendant did not further appear, and on the 12th day of June, 1912, the sale was confirmed.

As we view the record, the objections were not well taken. The certificates of liens were waived in writing by the plaintiff, and therefore were not made. The record shows that the land was duly and regularly advertised six consecutive weeks before the day of the sale. The land was clearly described and the plaintiff was named in the advertisement. In fact, the objections were without merit, and the court did not err in striking them from the files. This case should be ruled by *Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 705. There was no error in confirming the sale.

On the hearing it was argued that the court erred in rendering a deficiency judgment against the defendant. From an examination of the decree it appears that the findings contained therein were sufficient to authorize the court to render the deficiency judgment for $97.60.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

IN RE ESTATE OF ANTON VASEK.
EMANUEL VASEK ET AL., APPELLANTS, V. JOSEPH VASEK, ADMINISTRATOR, APPELLEE.

FILED JANUARY 29, 1915. No. 17,919.

Executors and Administrators: FINAL ACCOUNT: CREDITS: SALE OF LAND: PAYMENT OF LIENS. An administrator, who, in selling mortgaged land for the payment of debts, pays prior liens in good faith out of the proceeds of the sale, and complies with an order of court to take a first mortgage for a portion of the unpaid purchase price, is entitled in his final account to credit for the amount thus paid, where the land sold for its full value, and the sale was approved and confirmed by the court, though the statute requires such sales to be made subject to existing liens.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

George W. Wertz, for appellants.

Cain & Mapes, contra.

BARNES, J.

This is a controversy between the heirs of Anton Vasek, deceased, and the administrator of his estate over an item of $2,797.49 in the latter's final account. To pay debts the administrator, under a license from the district court for Colfax county, sold for $18,240 a quarter section of land encumbered by a mortgage for $2,500. His license directed him to make the sale "subject to all liens and

encumbrances" upon the following terms: Five thousand dollars in cash, half the balance upon confirmation, and the remainder in three years, "to be secured by first mortgage." In offering the land for sale, the administrator announced that from the cash payment he would pay off the mortgage and convey to the purchaser a clear title. The sale for $18,240 was reported to and confirmed by the district court. From the proceeds the administrator paid off the existing mortgage, and he afterward conveyed the land to the purchaser, taking a mortgage thereon to secure the unpaid balance of the purchase price. His final account showed the receipt of $18,240, the purchase price of the land sold, and the disbursement of $2,797.49, the amount of debt and interest paid on the released mortgage. To the allowance of the latter item the heirs of decedent excepted. The county court overruled the exceptions, and the heirs appealed to the district court, where the judgment of the county court was affirmed. From the affirmance, they have appealed to this court.

The heirs contend that the administrator, in paying mortgagor's debt and in selling the land free from encumbrance, departed from mandatory provision of statute, and that he is chargeable in his final account with the entire purchase price without any credit for the amount thus illegally paid. The statute provides: "All sales and conveyances of land made by executors or administrators, pursuant to the provisions of this article, shall be subject to all charges thereon, by mortgage or otherwise, existing at the time of the death of the testator or intestate." Rev. St. 1913, sec. 1477.

The record shows that the sale was irregular, but it was approved and confirmed by the court, and it was therefore binding upon all parties. If the heirs had appealed from the order of confirmation, it would no doubt have been corrected, but they failed to object to the order or perfect an appeal, and it became a binding adjudication and was final. While it is true that the statute was not strictly followed, we are of opinion that the order was not void. The heirs waited until after the sale and confirmation

and received the full benefit thereof. After having, by their silence, lulled the administrator into security, they now attempt to make him give them $2,797.49, to which they have no claim either in equity or good conscience. We are therefore of opinion that they cannot enforce such a claim. The record shows that the land sold for its full value, free from encumbrances, and that the heirs were not injured by the action of the administrator. The order of sale directed him to secure a share of the unpaid purchase price by a first mortgage. He could only comply with this requirement by discharging the lien of the existing mortgage. This he did by paying the same out of the proceeds of the sale. After allowing him credit for the amount paid by him for that purpose, the heirs will receive the full amount to which they are justly entitled. In settling the estate, therefore, he should be allowed credit for the item in dispute. *Millard v. Harris,* 119 Ill. 185; *Abby v. Fuller,* 8 Met. (Mass.) 36; *Russell v. Wheeler,* 129 Mich. 41.

The holding of the district court is in harmony with these views, and the judgment is

AFFIRMED.

MORRISSEY, C. J., SEDGWICK and HAMER, JJ., not sitting.

JOSEPH H. JAMES, APPELLEE, V. HAYDEN BROTHERS, APPELLANT.

FILED JANUARY 29, 1915. No. 17,998.

1. **Municipal Corporations:** USE OF STREETS: ACTIONABLE NEGLIGENCE. It is actionable negligence to drive a horse, attached to a wagon, in such a manner as to collide with, knock down and injure a pedestrian lawfully walking along the sidewalk of a public street of a city.
2. **Master and Servant:** NEGLIGENCE OF SERVANT: LIABILITY OF MASTER. The person thus injured, without fault on his part, may recover of the master of the driver for his injuries, if, at the time of the

collision, the driver was engaged in carrying on the master's business.

3. **Damages: REMITTITUR.** The evidence failing to show any permanent injury, a verdict for $4,000 is excessive, and the plaintiff should be required to file a remittitur of $2,000 or the judgment will be reversed; but, if the remittitur is filed, the judgment thus reduced will be affirmed.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed on condition.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Jefferis & Tunison, contra.

BARNES, J.

This was an action for damages for personal injuries. The plaintiff alleged in his petition that the servant and employee of the defendant, while in the course of defendant's business, carelessly and negligently omitted to control a horse and vehicle which he was then driving, and negligently and carelessly drove and managed said horse and vehicle at a rapid and dangerous rate of speed, and without regard to the rights of the plaintiff, who was upon the sidewalk on one of the streets of the city of Omaha, and, by reason of said negligence, the horse and vehicle violently ran upon and across said sidewalk, and against and upon the plaintiff with great force and violence, while the plaintiff, in the exercise of ordinary care, and while in plain view of said driver, was walking eastward on the south sidewalk of Izard street and in front of a gateway leading into the feed stables of the defendant, and thereby struck and knocked the plaintiff with great force and violence upon the ground, and dragged him and ran over and injured him severely and permanently. Defendant, by its answer, admitted that it was a corporation, organized and existing under and by virtue of the laws of the state of Nebraska; admitted that on or about November 3, 1911, a collision occurred between plaintiff and a horse and vehicle belonging to defendant; denied each and every allegation of the

plaintiff's petition and, further answering, alleged that plaintiff's injuries, if any, resulting from the aforesaid collision, were received through plaintiff's own carelessness and negligence, and not through that of the defendant. The cause was tried in the district court for Douglas county. The jury returned a verdict for the plaintiff for $4,000, on which the court rendered judgment, and the defendant has appealed.

It appears that on the 3d day of November, 1911, the plaintiff, while walking east on the sidewalk on the south side of Izard street, in the city of Omaha, and while passing the defendant's barn, where it kept its teams and delivery wagons, was run down by the horse and wagon of defendant, which a servant of the defendant was driving from the street into defendant's yard. The accident, as described by the witnesses, occurred as follows: The plaintiff, while lawfully passing along the sidewalk in the prosecution of his own business, had occasion to pass defendant's premises where there was a driveway from the street across the sidewalk into defendant's yard and barn. It was a cold day, and plaintiff had on an overcoat, with his hands in his pockets. He was walking along the sidewalk looking neither to the right nor to the left. Just at that instant, the defendant's servant, with a horse and wagon, on his way to the barn, came up behind the plaintiff from the west and turned in onto the driveway. As the horse was about to collide with plaintiff, the driver called, "Look out!" and at the same instant the horse's head struck the plaintiff and knocked him down. The horse veered slightly to the east, the wagon ran against the plaintiff and dragged him into the yard. The person who was driving the horse uttered a profane exclamation and went on his way, while another of defendant's servants came out from the barn, helped the plaintiff up, took him into the barn, washed his cuts and bruises, brushed his hat and clothing, and started him on his way. The plaintiff went to his home, and sent for Dr. Bliss, who attended to his injuries, which will hereafter be more particularly described.

It is defendant's first contention that the evidence was insufficient to justify a verdict for the plaintiff and against the defendant. We think this contention should not be sustained. The plaintiff, when struck by the defendant's horse, was lawfully passing along the sidewalk on the public street of the city, attending to his own affairs. He had no notice that any one was approaching him or intended to enter upon the driveway across the sidewalk. The driver of defendant' horse was approaching the driveway from the west and behind the plaintiff. One of defendant's witnesses testified that the horse was trotting as it came down the street and turned into the driveway. The view of the driver was unobstructed, and he must have been aware of the fact that plaintiff was crossing the driveway and did not see him. The driver was in a hurry to get his horse put up, for it was about noon, and it is apparent that he negligently and carelessly drove the horse against the plaintiff without giving him timely warning of his approach. The evidence was therefore sufficient on this point to sustain the verdict.

Defendant's second contention is that the verdict and judgment were grossly excessive, and that the verdict was given as a result of passion and prejudice. This requires us to consider the evidence relating to the plaintiff's injuries. The record shows that the plaintiff's head was cut open in two places. The wound on the back of his head was the more extensive, and was bleeding profusely. There were other bruises and abrasions on his person, and especially on his wrists, which abrasions were filled with dust and cinders. He complained of an injury to his back, and could hardly walk. After his wounds were washed, he went home, and called Dr. Bliss. The doctor dressed his wounds and prescribed rest and the use of some kind of liniment. This was the only treatment which the doctor gave him, and, after a couple of visits, he was not again called. The plaintiff remained in bed some time, and did not attempt to do any work for about two months. At the time of the accident he was a collector for the Singer Sewing Machine Company and was earning about $85 a month. About the

1st of February, 1912, he obtained a position as collector for the Independent Telephone Company at $15 a week. This position he held until that company went out of business. He then obtained employment as a solicitor and collector for a furniture company, and at the time of the trial was earning $12 a week. It thus appears that plaintiff suffered some diminution of his earning capacity by reason of his injuries. He testified that his wounds healed up all right, but he complained of his back and lameness in one of his hips. He testified that he was continually troubled with it, and that he easily became tired and did not rest well nights; that he obtained relief from the use of hot baths and liniment. Shortly before the trial, plaintiff was examined by Drs. Bliss and Bacon, and their evidence appears in the record. Neither of these witnesses testified that plaintiff's injuries were necessarily permanent. Dr. Bliss advised plaintiff to have an X-ray examination of his hip; but this was not done, and there is no competent evidence that plaintiff was permanently injured. Dr. Bliss stated that his recovery might require considerable time; but he did not state that his injuries were permanent. Two other competent medical experts, who heard the evidence of Drs. Bliss and Bacon, testified that they could not determine from the examination made by those doctors that the plaintiff had sustained any permanent injury.

As we view the evidence, the verdict for $4,000 was grossly excessive and should have been materially reduced. If the plaintiff files a remittitur with the clerk of this court in the sum of $2,000, within 30 days, the judgment as thus reduced will be affirmed; otherwise the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

MORRISSEY, C. J., ROSE and SEDGWICK, JJ., not sitting.

MAUDE NEWMAN, APPELLEE, V. JOHN DOVEY, JR., APPELLANT.

FILED JANUARY 29, 1915. No. 18,007.

1. **Bastardy**: PRELIMINARY EXAMINATION: TRANSCRIPT OF EVIDENCE. Where, in a prosecution instituted under the provisions of chapter 7, Rev. St. 1913, it was stipulated by the parties that the testimony of the complainant should be taken in shorthand and transcribed and certified by the magistrate, which was done, and the testimony was filed in the district court before the trial, an objection of the defendant to being placed on trial because complainant's evidence was not reduced to writing by the magistrate was properly overruled.

2. ———: COMPLAINT: SUFFICIENCY. An objection to the complaint, which was filed before the birth of the child, that it did not state that the child was born alive, should be overruled.

APPEAL from the district court for Webster county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Bernard McNeny, for appellant.

E. U. Overman, F. J. Munday and *Fred Maurer, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Webster county, in which John Dovey, Jr., was adjudged to be the father of a bastard child, of which Maude Newman, an unmarried woman, was the mother.

It appears that a complaint, in the usual form, was filed before the county judge of Webster county, acting as magistrate. A preliminary hearing was had, and the defendant was bound over to the district court to answer to the charge. When the complaint was filed, the child was not born. The complaint alleged that the complainant was pregnant with a bastard child. This was all the allegation that could have been made upon that subject. The complaint was therefore sufficient. If the child had died after the filing of the complaint, that would be a matter of defense or of

mitigation of the amount of the recovery. The objection was therefore properly overruled. The cause was tried on the original complaint filed before the magistrate. The defendant pleaded not guilty, and objected to being placed on trial on the ground that the magistrate, before whom the testimony on the preliminary examination was taken, did not reduce the complainant's testimony to writing, as the law required, and that no transcript of the testimony taken and reduced to writing by the magistrate had been filed in the district court, as required by law. His objection was overruled, the testimony on both sides was taken, and the jury returned a verdict finding the defendant guilty. A motion for a new trial was overruled, and the court rendered judgment on the verdict that the defendant was the reputed father of the child, and charged him with its maintenance in the sum of $1,200, payable in six instalments.

Defendant's first assignment of error is that the complaint was not sufficient to require him to be put upon his trial, in that it failed to allege the birth of the child, or that the child was then alive. The second error complained of is that the defendant was wrongfully put upon his trial in the absence of the written examination of the complainant upon the examination before the magistrate. The statutes provide that the testimony of the prosecutrix shall be reduced to writing and filed in the district court by the magistrate before whom the preliminary examination is held. It appears from the record that, at the time of the preliminary examination, it was agreed, by both parties, that the testimony of the prosecutrix should be taken in shorthand and then reduced to writing, and should be certified by the magistrate and filed in the district court. This was done, and at the time of the trial the shorthand notes had been transcribed, the magistrate had duly certified to the correctness of the same, and the prosecutrix's evidence, thus preserved, was on file in the district court. We know of no reason why this method of procedure should not have been resorted to. Defendant cites the case of

Morgan v. Stone, 4 Neb. (Unof.) 115. The opinion in that case does not support the defendant's contention. The record discloses that the testimony of the complaining witness was on file at the time of the trial, and, if the defendant had desired to introduce it in evidence to refute her testimony on the trial, it was available to him, but he did not see fit to make any use of it.

It appears from the record that the testimony of the prosecutrix was reasonable; that it was delivered in a straightforward, convincing manner; and, if the jury saw fit to believe her evidence, it was sufficient to sustain the verdict. By his testimony the defendant denied that he was the father of her child, but that was a fact for the determination of the jury.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

FAY WHITFIELD ET AL., APPELLEES, V. MAMIE E. CLARK; T. LEWIS YOUNG ET AL., APPELLANTS.

FILED JANUARY 29, 1915. No. 18,010.

Judgment: LIEN ON REALTY. A judgment creditor, by transcripting his judgment to the district court, does not obtain a lien upon real estate which has been conveyed to a third party by the judgment debtor by a duly recorded deed.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed in part, and reversed in part.*

William G. Rutledge, for appellants.

Lambert & Armstrong, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Nemaha county confirming the proceedings and sale in

a partition suit. The appeal is prosecuted by a creditor of William E. Watkins, the one-time owner of a share in the estate which was disposed of by the judgment from which this appeal was taken.

The record discloses that on the 2d day of August, 1910, one William G. Watkins died intestate, seized in fee of the southeast quarter of section 18, township 6, range 14 east of the sixth P. M., situated in Nemaha county. The decedent left nine children, of whom William E. Watkins was one, and who inherited a one-ninth of the land above described. On February 24, 1911, William E. Watkins conveyed by warranty deed his interest in the above described premises to his sister, Fay Whitfield. Her deed was filed for record in the office of the county clerk of Nemaha county on the following day. On April 5, 1911, the appellants herein, Young and Young, recovered a judgment in the county court of said county against said William E. Watkins for the sum of $232.85, and $4.40 costs. An execution was issued on the judgment and returned unsatisfied. On the 8th day of April, 1911, a transcript of said judgment was filed in the office of the clerk of the district court. No execution was issued on the judgment after it was filed in the office of the clerk of the district court, and no proceedings were taken to obtain satisfaction of the judgment or make it a lien on any real estate, other than the filing, docketing and indexing of the same, and except the proceedings hereinafter set forth.

It further appears that Fay Whitfield commenced an action to partition the estate. Appellants filed an answer and cross-petition, claiming their judgment to be a prior lien on the former interest of William E. Watkins, and also praying for a partition of said premises. On the trial of the partition suit, the court found and decreed that the appellants had no lien by virtue of their judgment upon the interest in the real estate formerly owned by William E. Watkins, and which was conveyed by his deed to Fay Whitfield. To this finding and decree the appellants excepted. On September 21, 1912, the real estate was sold by a referee to the appellee Margaret Katherine Watkins.

The appellants filed objections to the confirmation, which were overruled, and an exception was taken. The sale was confirmed and a deed was made to the purchaser. The court fixed the sum of $500 as the amount of the supersedeas bond, and ordered the referee to retain in his hands, pending the final determination of the appeal, the sum of $310 of the proceeds of the sale.

Appellants contend that the finding and judgment of the trial court, that as a creditor they had no interest in, or lien on, the share of their debtor, William E. Watkins, in the estate disposed of by the decree, is not sustained by the evidence and is contrary to law. The only question presented by the appeal is: Was the appellants' judgment, which was transcripted to the district court, a statutory lien on William E. Watkins' share of his father's estate, which he conveyed by warranty deed to his sister, Fay Whitfield? When the transcript of appellants' judgment was filed in the district court, the judgment debtor had conveyed his share of his father's estate to his sister, and her deed had been recorded. The conveyance was fraudulent as to creditors, but was not void; it was voidable only. It was good between the parties to it, and conveyed the legal title to the grantee, which might be defeated by proceedings in the nature of a creditor's bill. Appellants took no action whatever to create a specific lien on the debtor's interest in the estate. There was no attempt to levy an execution thereon, and no creditor's suit was commenced by them. It follows that this case should be ruled by *Flint v. Chaloupka,* 72 Neb. 34, where it was held that such a judgment is not a specific lien on real estate which has been conveyed to a third person.

The order of the district court, requiring the referee to retain in his possession the amount of the appellants' judgment, should be set aside, and the judgment of the district court is in all other things affirmed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., not sitting.

DAVID A. MINICK, APPELLANT, V. SAMUEL A. REICHENBACH ET AL., APPELLEES.

FILED JANUARY 29, 1915. No. 17,916.

1. **Limitation of Actions**: SUIT TO DECLARE DEED A MORTGAGE. "The statute of limitations runs against a bill to declare a deed absolute in form a mortgage, in favor of a grantee in possession, from the time such possession becomes adverse to the grantor's title." *Stall v. Jones*, 47 Neb. 706.
2. **Adverse Possession**: INFERENCE FROM ACTS OF OWNERSHIP. "That grantee's possession is adverse may be inferred from the exercise by him of acts of ownership after payment of the debt." *Stall v. Jones*, 47 Neb. 706.
3. **Deed as Mortgage**: TITLE. "In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage." *Stall v. Jones*, 47 Neb. 706.
4. ———: EQUITY OF REDEMPTION: FORFEITURE. "Therefore, where the grantee under such a deed is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting." *Stall v. Jones*, 47 Neb. 706.
5. **Appeal**: AFFIRMANCE. Upon a trial *de novo* this court finds, as did the district court, that the plaintiff is not entitled to the relief prayed.

APPEAL from the district court for Butler county: EDWARD E. GOOD, JUDGE. *Affirmed.*

C. M. Skiles and *R. C. Roper*, for appellant.

L. S. Hastings and *E. A. Coufal, contra.*

LETTON, J.

This is an action in equity to declare a conveyance in the form of a warranty deed to be a mortgage and to be allowed to redeem. The district court found generally for defendant. Plaintiff appeals. The case seems to have been tried on the petition and the separate answer of Samuel A. Reichenbach, since we find no reference to the other defendants in the pleadings or decree.

The allegations of the petition may be summarized as follows: That the plaintiff was in 1888 the owner of 320 acres of land in Butler county, which he occupied with his family as his homestead; that in 1893 he borrowed $4,000 from the Aetna Life Insurance Company, which was secured by a mortgage on this land; that the defendants Reichenbach are the officers and owners of the Rising City Bank, a corporation, and that in 1893 the plaintiff, in order to pay prior debts to the bank, executed notes to the sum of $4,500, and, to secure the same, gave a mortgage to Samuel A. Reichenbach, subject to the mortgage of the Aetna Life Insurance Company; that in 1895 the plaintiff was financially embarrasssed, and that at that time the bank had a number of notes due other parties against the plaintiff for collection, which the owners had ordered to be sued; that defendant urged plaintiff to convey the premises to him in order to prevent judgments being rendered and levied upon the land, and promised him that he could redeem at any time by paying the debt due the bank, and that they would reconvey the premises; that, relying upon this promise, on September 30, 1895, he conveyed the premises to Samuel A. Reichenbach by a deed absolute in form, but it was intended by both parties only as a mortgage; that the farm at that time was worth $14,000; that afterwards the plaintiff was worried because he could not redeem the farm, and on account thereof suffered a paralytic stroke on the 1st day of June, 1900, which rendered him weak-minded, unable to understand his rights, and not of sufficient mental capacity to realize the necessity of taking action to protect his title to the farm; that he continued in this condition, except at intervals, until April 2, 1906, when he suffered a second shock, and from that time to 1911 he was mentally incompetent; that not until shortly before the commencement of this suit was he in full possession of his faculties; that on February 5, 1902, defendants acknowledged that the deed was merely given as security, and offered to reconvey on the payment of the amount due them, including the first mortgage, which they had paid; that on December 11, 1911, he of-

fered to pay all money due the defendants, asked for an accounting, and demanded a reconveyance, which was refused. He offers to pay the full amount due and demands a reconveyance.

The answer alleges that on September 30, 1895, the Aetna mortgage and interest, the $4,500 debt to the bank, and taxes paid by the defendants amounted to over $10,000; that, the land not being worth more than the indebtedness and liens, the plaintiff with his wife conveyed it to defendant; that defendant leased the land for a crop rental to plaintiff year after year until the 1st day of March, 1901, when plaintiff moved to another farm which he had purchased near-by; that between January 9 and March 29, 1899, the plaintiff claimed for the first time the right to redeem the land; that defendant then stated that he would convey the same to him if he would pay all of this indebtedness; that they agreed upon the sum of $10,369 as the amount then due, which amount was then the fair value of the land; that prior to the 29th of March, 1899, the plaintiff stated he was unable to obtain the money, whereupon defendant informed plaintiff that there must be a settlement; that plaintiff then agreed that if defendant would lend him the money to buy a smaller farm, pay for the improvements he had placed upon the farm, and deliver to him the notes, he would move off the premises on the 1st day of March, 1901; that, in pursuance to this agreement, the defendant delivered the notes, paid for a windmill wheel and chicken house left on the farm, amounting in all to $65, released the Aetna mortgage and the mortgage that had been given to him, and it was agreed that this was a full and complete settlement of any interest in the premises or right to redeem plaintiff had; that, in accordance with this agreement, the defendant loaned the plaintiff and his wife $2,235 with which to pay for the other farm; that plaintiff moved there as agreed; that defendant has been in exclusive possession ever since the settlement, claiming title, with the full knowledge of plaintiff; that he has made valuable improvements, amounting in all to about $2,000; has paid all taxes for the last 18 years; that

the land has increased in value to $35,000—all of this with the plaintiff's knowledge; and plaintiff has not asserted a right to redeem until this suit was begun. He also pleads laches, adverse possession, and the statute of limitations.

In the reply plaintiff admits that he delivered to defendant each year one-third of the crop, but alleges that this was for the purpose of keeping up the taxes and repairs, and that it was agreed that, if the share of the crop should more than pay these items, the surplus should be applied on the principal. He also alleges that he moved onto the smaller farm on account of being unable to work the large farm, and that it was agreed that thereafter defendant should continue to receive one-third of the crop and apply it upon the debts.

The pleadings have been set forth because they show, perhaps, in the most abridged and convenient form the contentions of the respective parties; and it may be said that with one or two exceptions, which will be hereafter noticed, the evidence on the part of the plaintiff and defendant support in the main the respective allegations in the pleadings. The direct conflict in these statements is reflected in the evidence as to almost every material fact in the case.

There is such a mass of testimony that the proper limits of this opinion will not allow a comparison and discussion of it. Since we have not the great aid to the ascertainment of truth afforded by seeing the witnesses and hearing them testify, we are inclined to attach great weight to the undisputed testimony as to the conduct of the respective parties with reference to the land. In the answer it is said that after defendant had paid the Aetna mortgage, and prior to the 28th day of March, 1899, plaintiff claimed for the first time the right to redeem the land; "that thereupon this defendant stated to plaintiff that he would convey said premises to him if he would *then pay to him the amount of his indebtedness* to defendant, including interest thereon, together with insurance premiums that he had paid to keep the buildings on said premises insured, and the taxes, that he (defendant) had paid on said lands, together with what he had paid to the Aetna Life Insurance

Company; that thereupon he and said plaintiff computed the amount which would be due the defendant from the plaintiff as aforesaid, and that from said computation they found and agreed upon the sum of $10,369 as the amount *that would then be due from the plaintiff to the defendant,* under the said arrangement, which amount was then the fair market value of said land." These allegations amount to an admission by defendant that, at the time of the conversation with Mr. Aldrich hereafter mentioned, there was an existing indebtedness; that the evidence of this indebtedness was still in the hands of defendant; and that plaintiff then had the right to redeem. The rights of the respective parties, therefore, must be determined by a consideration of whether there was a subsequent arrangement or contract between them whereby the Minicks surrendered this right. This must be determined from the evidence and the conduct of the parties with reference to the land. Several years after the deed was executed, and at a time the date of which is in dispute, Mr. Minick asked Mr. Aldrich, a lawyer of David City, to make a loan upon this land and to see if it could be redeemed. Aldrich consulted defendants, and defendants offered to reconvey the land if the indebtedness was paid. This is evidently the basis of the admission in the answer. Mr. Aldrich was unable to make or procure the loan. Defendant testifies that shortly afterwards he requested Mr. and Mrs. Minick to come to the bank; that they came, and a conversation was had in which defendant stated that he wanted the matter settled as to whether Minick claimed any rights in the premises, and that a settlement was had whereby Minick orally renounced all claim to the land and right to redeem, and Reichenbach (as he claims) delivered the notes, and agreed to furnish him the money with which to buy another and smaller farm.

On March 6, 1900, plaintiff made a contract to purchase the Carter farm of 160 acres. He paid $100 down, agreed to pay $500 on May 1, 1900, and $3,100 on or before March 1, 1901; and possession was to be given at that time. Defendant furnished the money for the last payment and took

a second mortgage on the place (which had a prior mortgage upon it of $1,800) as security. The payment was made, and Minick moved to the Carter place on the 1st of March, 1901. Before he moved he demanded and received payment for a chicken house and a windmill wheel which he had placed upon the farm after the deed to Reichenbach was made, saying that, unless he was paid for them, he would remove them to his new farm. Plaintiff insists that the conversation and agreement with Mr. Aldrich to allow redemption did not occur until 1902. To show this, he testifies that he went to see Mr. Aldrich about a claim made against him by a hired man which was not asserted until 1902, and he produced a letter of that year in which the claim of an employee for an amount said to be due him for services was made. Mr. Aldrich testified that he visited the land in 1899 or 1900, while he was undertaking to procure the loan, and that Mr. Minick was living upon it at the time, and also says that it was at a time when he had gone to look at some black cattle near Rising City. If he went while Minick was on the farm, his testimony corroborates that of defendant as to the year in which the alleged settlement occurred; but, if it was when he went to look at the cattle, it was probably some time in 1901. The evidence for the defendant as to the agreement that plaintiff should give up the right to redeem, in consideration of the cancelation of his indebtedness and the new loan with which to buy the Carter farm, is most consistent with all the circumstances; and we believe that this and the Aldrich interview occurred some time in the fall of 1900, and while plaintiff was still on the farm. From that time until December, 1911, plaintiff never set foot upon this land. Although there is both oral and documentary evidence to show that he had hundreds of transactions with the bank during this interval of time, borrowing money in order to carry on his stock feeding and shipping operations, paying and renewing notes, keeping a bank account there and drawing numerous checks, he says himself he never requested a statement as to the receipts or disbursements of money from the farm. He never inquired

whether the taxes were being paid, or whether anything was being applied upon the debt, as he asserts it was agreed should be done. He knew that the defendant was making lasting improvements, such as building corn cribs and granary, repairing, repainting and reshingling the house, barn, etc.; but he seemed to have lost all interest in the farm.

With respect to the plea of weakness of mind on the part of the plaintiff as constituting a disability which would toll the running of the statute of limitations, it appears that he suffered a stroke of paralysis on June 1, 1900; but its effect, so far as beclouding his intellect, passed away to a great extent in a comparatively short time. Until the time this suit was begun, except for a short time in 1906 when he suffered another and a less severe attack of the same disease, he was able to conduct and direct, not only ordinary farming operations, but the purchasing and feeding of cattle, their shipment to South Omaha to market (himself often accompanying and selling them upon the market)and the disposition of the proceeds. It is also shown that in the same interval he successfully conducted the Carter farm and practically paid off the whole purchase price, with no one to help him except his wife and a hired man. The large number of checks upon and notes given to the defendants' bank show that the business he conducted was in excess of that of the ordinary farmer. The oral waiving of the right to redeem was in the fall of 1900, as we view the evidence, after plaintiff had recovered in great measure from the effects of the stroke of June 1, and at a time when he was competent to transact and was transacting his own business. Ten full years intervened during which he was fully competent to act and during which he remained silent. During the later years of the period an unprecedented rise in the value of land took place, and after this had occurred he took action. It seems to us that his conduct during and after this long period of time is most persuasive in determining the character of his relation to the land. Actions often speak louder than words.

More than ten years' possession, accompanied by acts of exclusive ownership, such as the erection of buildings and making other valuable improvements upon the land, of which plaintiff was aware, without consulting him or requesting his consent, the retention of the entire proceeds of the farm, without offering to account, and other acts inconsistent with any admission of title in the plaintiff, should have been enough to apprise him that the defendant claimed and was asserting the exclusive title. His own acts also in diverting the earnings and profits of the Carter farm to other purposes than the attempt to redeem seems inconsistent with his testimony. Moreover, aside from the plea of the statute of limitations, we are convinced that Minick parted with all right to redeem soon after the Aldrich incident. His conduct shows it; and hence, even if ten full years have not intervened, he still must be denied the relief he seeks upon the facts.

Reichenbach was in possession of the land at the time of the settlement, by Minick as tenant, and he has continued in possession until this day. Under the authority of *Stall v. Jones,* 47 Neb. 706, the right to an accounting was parted with when the oral setlement was made, and Minick had no further interest in the land. We have come to these conclusions as to the weight of evidence more by a consideration of the actions of both parties than upon their spoken words.

We believe the judgment of the district court warranted by the proofs, and it is therefore

AFFIRMED.

MORRISSEY, C. J., SEDGWICK and HAMER, JJ., not sitting.

MABEL C. KING, APPELLEE, V. PHYSICIANS CASUALTY ASSOCIATION OF AMERICA, APPELLANT.

FILED JANUARY 29, 1915. No. 18,000.

1. **Insurance**: MUTUAL BENEFIT ASSOCIATION: DIRECTORS. The by-laws of a mutual benefit association specified in detail the duties of the president of the association. These did not include duties as a member of the board of directors, of which the president was *ex officio* a member. Another by-law provided that, in the absence of the president, it should be the duty of the vice-president to perform the duties belonging to the office of president. *Held*, That the president alone became *ex officio* a member of the board of directors, and that the vice-president did not, in the absence of the president, become a member of such board.

2. ———: ———: SUSPENSION OF MEMBER: NONPAYMENT OF ASSESSMENT. When the failure to pay an assessment is claimed as a reason for the suspension of a member of a mutual accident association, which suspension forfeits the interest of the member in the association, the assessment must be made by a legally constituted body under the charter and by-laws of the association. If the assessment is not made by such a body, no suspension for its nonpayment can be made.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Nolan & Woodland, for appellant.

James H. Adams and *Byron G. Burbank, contra.*

LETTON, J.

Action upon a certificate of membership in a mutual accident insurance company to recover for the accidental death of a member. The court directed a verdict in favor of plaintiff for the amount of the certificate and costs. Defendant appeals.

The defendant is a mutual accident insurance association incorporated in 1902. In 1907, Walter S. King, the husband of the beneficiary (plaintiff), became a member of the association. On May 3, 1911, an assessment was

made upon the members payable on or before June 10. Dr. King did not pay the assessment. He was accidentally injured on the 15th and died on the 16th of June. Payment was refused on the ground that Dr. King became suspended after June 10 on default of payment and so remained at the time the accident occurred.

Plaintiff insists that, under the original by-laws of the association, there was no provision for suspension of the members for nonpayment of assessment at any time that the subsequent attempted amendment was void; that the laws of the state as to filing amendments to by-laws were not complied with; and that the assessment for the nonpayment of which Dr. King was suspended was not legally made. We find it only necessary to consider the latter point.

Section 6, art. IV, of the by-laws, provides, among other things: "The president and secretary shall be *ex officio* members of the board of directors." Section 4 provides: "In the absence of the president, it shall be the duty of the vice-president to perform the duties belonging to the office of president." Section 5, art. XVI, provides: "Six members shall constitute a quorum for the transaction of business at meetings of the board of directors." The assessment was made at a meeting at which four elected directors, the secretary and the vice-president were present. Defendant asserts that the vice-president, by virtue of the provision that, in the absence of the president, it shall be his duty to perform the duties belonging to the office of president, is thereby constituted *ex officio* a member of the board of directors, and that therefore there was a quorum present. We will consider this without deciding that, as plaintiff claims, the provision making these officers *ex officio* members of the board is in conflict with the articles of incorporation and therefore void, and assuming its validity. It is no part of the duties of the president of an association of this nature to act as a member of the board of directors. Sections 1-3, art. IV, of the by-laws, specify in detail the duties and powers of the president of the association. These are the "duties" which it is

intended that the vice-president shall perform in the absence of the former officer, and they do not include *ex officio* powers. Section 4, immediately following, contains the provisions referring to vice-president. If it had been the intention, at the time the by-laws were enacted, that the vice-president should act as a member of the board of directors in the absence of the president, no doubt they would have so provided. The term "*ex officio*" denotes by virtue of the office. It cannot reasonably be said that, when the vice-president is performing the duties of president, he thereby holds the office of president. No one but the actual occupant of the office of president can be, by virtue of that office, a member of the board of directors, since it is only the president, the particular officer, who is so constituted by the by-laws. The by-laws require six directors to be present in order to constitute a quorum. Only five directors were present at the meeting of May 3. The assessment was made without power or jurisdiction on the part of the body attempting to make it. When the failure to pay an assessment is claimed as a reason for a suspension which forfeits the interest of a member in the association, the assessment must be made by a legally constituted body under the charter and by-laws of the association. Dr. King was still a member of the association at the time of the accident, and the judgment of the district court in directing a verdict for plaintiff was right.

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

C. B. HAVENS & COMPANY, APPELLEE, V. COLONIAL APARTMENT HOUSE COMPANY ET AL., APPELLANTS.

FILED JANUARY 29, 1915. No. 17,903.

1. **Corporations: RIGHT TO SUE: FORFEITURE OF CHARTER.** After the charter of a corporation has been forfeited, under the act of 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. Laws 1909, ch. 25.

2. ———: ———. The provisions of the general corporation law, authorizing dissolved corporations to sue in the corporate name, do not apply to a corporation whose charter has been forfeited, under the act of 1909, for nonpayment of the occupation fee. Comp. St. 1909, ch. 16, secs. 62, 67, 68; laws 1909, ch. 25.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

J. W. Woodrough and *Crane & Boucher,* for appellants.

D. L. Johnson and *H. S. Daniel, contra.*

ROSE, J.

This is a suit on a promissory note for $5,483.85, dated November 9, 1910, and due May 9, 1911. Plaintiff, C. B. Havens & Company, a domestic corporation, is payee. Colonial Apartment House Company, defendant, is maker. Defendants Edwin S. Rood and Thomas D. Crane are sued as indorsers. The principal defense pleaded is the incapacity of plaintiff to maintain the action, on account of the forfeiture of its charter for failure to pay an occupation fee. From a judgment in its favor for $4,868.28, defendants appeal.

Is incapacity of plaintiff to maintain the action established as a defense? Its occupation fee for the year ending June 30, 1910, was not paid, and for that reason the governor by proclamation declared its charter forfeited November 30, 1910. The original petition in the case was filed May 19, 1911, and the judgment was rendered June 29, 1912. The act under which the forfeiture was declared was passed in 1909. Laws 1909, ch. 25. It forbids a corporation "to do business by virtue of its charter" without an occupation permit; requires payment of an annual fee as a condition of exercising corporate powers; provides for notice and for forfeiture of the charter by proclamation of the governor for nonpayment of the fee; orders a public record of forfeitures and declares:

"It shall be unlawful for any corporation, delinquent under this act, either domestic or foreign, which has not paid the occupation fee, together with the penalty for such

delinquency, as in this act prescribed, to exercise the powers of such corporation, or to transact any business in this state, after the thirtieth day of November next following the delinquency. Each and every person who exercises any of the powers of a corporation so delinquent, either domestic or foreign, which has not paid the occupation fee, together with the penalty for such delinquency, or who transacts any business for or in behalf of any such corporation, after the thirtieth day of November next following the delinquency, shall be guilty of a misdemeanor." Section 8.

"In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation, whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited, and have full power to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of this state by any person having a claim against any of said corporations." Section 9.

The statutory forfeiture not only extends to the right to do business, but makes the exercise of corporate power a misdemeanor. The bringing of a suit in the name of the corporation is an attempt to exercise such power. After the delinquency, "each and every person who exercises any of the powers of a corporation," says the statute, "or who transacts any business for or in behalf of any such corporation," shall be guilty of a misdemeanor. The act, according to its own terms, not only forbids the bringing of a suit in the corporate name after delinquency and forfeiture, but its provisions are self-executing. Defendant argues, however, that a former, unrepealed statute authorizes dissolved corporations to prosecute suits in the

corporate name. Comp. St. 1909, ch. 16, sec. 144*m*. It cannot be denied that, under the statute as it existed when the act under consideration was passed, the law was as follows: "A dissolved domestic corporation may, after such dissolution, prosecute any suit in its corporate name in the same manner and with like effect as if the corporation had not ceased to exist." *Schmitt & Bro. Co. v. Mahoney,* 60 Neb. 20.

As already indicated, the statute, providing for the payment of an occupation fee and for the forfeiture of the charter, contains new and different provisions. It is an independent act covering the entire subject of legislation and modifies former statutory provisions at variance with its terms. The purpose to take away a dissolved corporation's existing right to sue in the corporate name, after the charter has been forfeited for nonpayment of the occupation fee, is manifest. The lawmakers have declared that the directors or managers are trustees with power to maintain actions, and that the exercise of corporate powers is a misdemeanor. These provisions would not have been inserted in the new law had the legislature intended the general statute to apply to the new conditions. Plaintiff was without capacity to sue or to maintain the action. Identical provisions of a California statute were discussed at length in recent opinions of the supreme court of that state. *Kaiser Land & Fruit Co. v. Curry,* 155 Cal. 638; *Newhall v. Western Zinc Mining Co.,* 164 Cal. 380. In the latter case the following language was used: "For that act clearly and unmistakably declares and provides for a forfeiture not dependent upon judicial determination and decree, but a forfeiture which is self-acting and operating. The language of the act does not even permit a doubt upon this question. It not only declares the day and the hour when the forfeiture shall arise, but it makes it a penal offense for any officer or agent thereafter to exercise any corporate powers on behalf of the corporation, and, finally, it provides that the winding up of the corporate affairs is imposed upon the directors or managers of the corporation who 'are deemed to be trustees of the corporation

and stockholders or members of the corporation whose power or right to do business is forfeited.' These trustees, and not the corporation, may sue or 'may be sued in any of the courts of this state by any person having a claim against said corporation.' * * * It empowers them as trustees to sue and be sued, but not to answer suits in the name of the defunct corporation." The reasoning in similar cases is in harmony with the language quoted. *MacRae v. Kansas City Piano Co.*, 69 Kan. 457; *Venable Bros. v. Southern Granite Co.*, 135 Ga. 508; *Hawley v. Bonanza Queen Mining Co.*, 61 Wash. 90.

Plaintiff cites a federal decision under a New Jersey statute, but it is distinguishable on account of differences in statutory provisions. *Harris-Woodbury Lumber Co. v. Coffin*, 179 Fed. 257.

Since plaintiff had no authority to maintain the action, the trial court erred in rendering judgment in its favor. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., SEDGWICK and HAMER, JJ., not sitting.

JENNIE E. HALLETT, APPELLEE, v. JAMES W. RANSOM, APPELLANT.

FILED JANUARY 29, 1915. No. 17,934.

Trial: VERDICT: SURPLUSAGE. Where the verdict contains proper findings on the issuable facts submitted to the jury, clearly indicating the judgment which the law should pronounce, severable matter outside of the pleadings, the proof, the issues, the instructions and the law may be rejected as surplusage.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

Mapes & McFarland and *Charles H. Kelsey*, for appellant.

M. D. Tyler and *M. B. Foster, contra.*

ROSE, J.

This is an action to recover $1,200 as profits clandestinely made by defendant while acting as agent for plaintiff in the sale of a farm owned by her in Madison county, near Norfolk. Defendant wrote to plaintiff, who resided at Seward, that the best price obtainable was $800. She promptly went to Norfolk, and in consideration of that sum executed a deed containing the name of M. B. Irwin as grantee. Subsequently his name was erased and that of M. O. Wolcott inserted. Within three months Wolcott sold the land to August F. W. Braasch for $2,000. It was pleaded by plaintiff, and the jury found, that defendant was the actual purchaser from her, and that he was the real grantor in the subsequent sale for $2,000. From a judgment in favor of plaintiff for $1,301.10, defendant appeals.

The principal assignment is that there was error in entering judgment on the verdict. It was rendered by the jury in this form:

"We, the jury duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of her recovery at the sum of $1,301.10, less the amt. of four hundred one and 10/100 $401.10. Said amt. being allowed the defendant for his expenses, commission and the advance in price of said land during the time said defendant came in possession of the land and the time same was sold to the said August F. W. Braasch. We therefore find for plantiff the sum of $900."

The trial court accepted the following as the verdict and rejected the rest as surplusage:

"We, the jury duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of her recovery at the sum of $1301.10."

The question for the determination of the jury was whether defendant, as shown by the pleadings and the proofs, acted for himself in transactions resulting in his making clandestine profits out of the business of his princi-

pal. Their finding in favor of plaintiff settled the issuable fact. In that respect the verdict is not only supported by the evidence, but it responds to the demands of justice and equity. With defendant's betrayal of trust settled in favor of plaintiff, the jury had nothing to do with the amount of the recovery. The law settled that question by awarding plaintiff clandestine profits amounting, with interest, to $1,301.10. The jury were so instructed. When they attempted to allow defendant a set-off or credit of $401.10, they went outside of the pleadings, the proofs, the issues, the instructions and the law. The trial court must be allowed to determine questions of law and to limit the work of the jury to the proper function of that arm of the judiciary. Under similar circumstances, the courts often reject extraneous matter in a verdict and enter a judgment conforming to the facts established by the findings of the jury. *Frank v. Symons,* 35 Mont. 56; *Schweitzer v. Connor,* 57 Wis. 177; *Pierce v. Schaden,* 62 Cal. 283. On principle the rule in this state is the same. *State v. Beall,* 48 Neb. 817. It would perhaps be better practice, before accepting such a verdict, to direct the jury to eliminate the surplusage but the action of the trial court in the present case did not amount to a reversible error.

One of the instructions is criticised, but, if erroneous, it is not prejudicial to defendant.

AFFIRMED.

MORRISSEY, C. J., and FAWCETT, J., not sitting.

HAMER, J., dissenting.

The verdict ought not to have been received. As it is now divided, it is not the verdict that the jury agreed upon. The verdict which they returned was clearly a compromise. If a verdict is to be regarded as the expression of the jury in the case, it should be what they have said. If they attempt to say something that is outside of the proper issues in the case, then all that they say on the subject should be rejected. No court should be allowed to substitute any sort of conception of the trial judge in

place of what the jury have solemnly agreed upon, whether it is correct or not. If the verdict is so far erroneous that it should not be considered, then it ought not to be received. That the verdict may be cut in two is an arbitrary assumption of the judge who attempts to substitute his view of what is legal in place of the jury's view of what is right. This cannot be accepted as the verdict, unless the court might properly have directed it. That it could not do if there was a fact properly before it to try.

GUS A. TYLEE, APPELLEE, V. ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT.

FILED JANUARY 29, 1915. No. 17,959.

1. **Master and Servant:** RELEASE: CONSIDERATION: PAROL EVIDENCE. An oral promise by an employer to pay an employee his regular salary during a temporary disability may be shown by parol to be a part of the consideration for a release of the employer's liability for personal injuries, though the employee signed a release for the expressed consideration of a specific sum of money.
2. **Principal and Agent:** CONTRACT BY AGENT: ACCEPTANCE OF BENEFITS. A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Helsell & Helsell, William Baird & Sons, Blewett Lee and *W. S. Horton*, for appellant.

W. C. Fraser and *J. C. Kinsler, contra.*

ROSE, J.

The suit was brought to recover $900 alleged to be due plaintiff for his salary as traveling watchman for defendant from April 8, 1911, to April 8, 1912, at $75 a month. Plaintiff was injured March 6, 1911, in alighting from a

moving passenger train operated by defendant. He pleaded that he settled his claim for resulting damages and signed a release in consideration of $10 paid to him by defendant and of an oral promise by the latter to pay his regular salary, while unable, on account of his injuries, to return to work; that in making the settlement defendant acted through its claim agent; that plaintiff was unable on account of his injuries to resume the duties of his employment before April 8, 1912; that defendant paid him his salary in full for March, 1911, but refused to pay it for any subsequent month. Defendant denied the execution of a release on the terms described in the petition, and alleged that its claim agent had no authority to make the oral promise pleaded by plaintiff. It is admitted that plaintiff was in the employ of defendant, and that his salary for the month of March, 1911, was paid; but it is alleged that he was not thereafter an employee of defendant, and that he is not entitled to any salary as such. From the judgment on a verdict for the full amount of plaintiff's claim, defendant has appealed.

One of the assignments of error challenges testimony of plaintiff on the ground that it varies and modifies the terms of a written instrument. The release signed by plaintiff makes no mention of a promise to pay his salary as a part of the consideration. After reciting the fact of the injury and the denial of liability on the part of the employer, the release reads:

"Now, therefore, in consideration of the sum of ten and 00-100 dollars ($10) to me this day paid by the Illinois Central Railroad Company in behalf of itself and any other companies whose lines are owned or operated by it, I do hereby compromise said claim and do release and forever discharge the said Illinois Central Railroad Company and all companies whose lines are leased or operated by it, their agents and employees from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent, and also do release and discharge them of all suits, actions, causes of action and claims for injuries and damages, which I have or might

have arising out of the injury above referred to, either to my person or property, and do hereby acknowledge full satisfaction of all such liability and causes of action."

The oral testimony of plaintiff tends to show that the promise to pay his salary during the temporary disability resulting from his injuries was part of the consideration for the release. It is argued that proof of this nature varies and modifies the terms of the written instrument quoted and is consequently inadmissible. What plaintiff signed was an agreement releasing defendant from liability for personal injuries. There is no attempt to vary the terms of the release itself. Plaintiff is not seeking damages for the tort. In effect, the action is one on an oral promise to recover part of the consideration for the release. The rule of law applicable to the present inquiry is that an oral promise by an employer to pay an employee his regular salary during a temporary disability may be shown by parol to be a part of the consideration for a release of the employer's liability for personal injuries, though the employee signed a release for the expressed consideration of a specific sum of money. *Galvin v. Boston Elevated R. Co.*, 180 Mass. 587; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289; *American Car & Foundry Co. v. Smock*, 48 Ind. App. 359; *Illinois C. R. Co. v. Fairchild*, 48 Ind. App. 300; *Texas C. R. Co. v. Eldredge*, 155 S. W. (Tex. Civ. App.) 1010; *Harrington v. Kansas City C. R. Co.*, 60 Mo. App. 223; *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550. It follows that the oral evidence was properly admitted.

It is further argued that the judgment in favor of plaintiff is erroneous because defendant's claim agent had no authority to make the oral agreement on which it is based. There is positive testimony that the oral promise to pay plaintiff his salary as pleaded was made by the claim agent as a part of the consideration for the release. On this issue the finding of the jury was in favor of plaintiff. To defeat a recovery on the cause of action pleaded in the petition, defendant introduced in evidence the release signed by plaintiff. It therefore invoked the protection of that in-

strument, and thus adopted the instrumentalities employed by its claim agent in procuring it, including the oral promise. On the record presented defendant is bound by the rule that a principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it. *American Car & Foundry Co. v. Smock*, 48 Ind. App. 359, 371; *Bertha v. Regal Motor Car Co.*, 180 Mich. 51; *Joslin v. Miller*, 14 Neb. 91; *McKeighan v. Hopkins*, 19 Neb. 33; *Rogers v. Empkie Hardware Co.*, 24 Neb. 653; *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb. 110; *Leavitt v. Sizer*, 35 Neb. 80; *Dresher v. Becker*, 88 Neb. 619; *Doll v. Getzschmann*, 90 Neb. 370.

There being no error in the record, the judgment is

AFFIRMED.

MORRISSEY, C. J., BARNES and SEDGWICK, JJ., not sitting.

WILLIAM HENRY ESSEX, APPELLANT, V. GILBERT SMITH ET AL., APPELLEES.

FILED JANUARY 29, 1915. No. 17,963.

1. **Limitation of Actions**: MORTGAGE FORECLOSURE: REDEMPTION. The statute of limitations does not begin to run against mortgagor's right to redeem the mortgaged land from a void foreclosure sale, until possession is taken under the mortgage or the foreclosure.
2. **Adverse Possession**: PRESUMPTION: UNIMPROVED LAND. The law presumes that the holder of the legal title is in possession of unimproved and unoccupied land.
3. **Limitation of Actions**: ACTION QUIA TIMET: POSSESSION. The statute of limitations does not begin to run against an action to remove a cloud from the title of a landowner while he is in exclusive possession.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

M. E. Crosby, for appellant.

J. G. Beeler and *Wilcox & Halligan, contra.*

ROSE, J.

The subject of litigation is a 300-acre tract of land in Lincoln county. In a proceeding to foreclose a mortgage thereon, the sheriff sold the land to Herman P. Chelins February 1, 1898, and on March 28, 1899, issued a sheriff's deed to the purchaser, who conveyed the land to Gilbert Smith. This is an action against Chelins, his grantee, and the latter's wife to quiet title in plaintiff, who alleges he acquired it through mesne conveyances from mortgagors. The trial court sustained a demurrer to the petition on the ground that the action was barred by the statute of limitations. From a judgment of dismissal, plaintiff has appealed.

Does the petition show on its face that the action is barred? It was filed May 21, 1912, and in substance alleges, in addition to the facts already narrated: The foreclosure was commenced June 6, 1898, after maturity of the unpaid debt. The judicial proceedings, including the sheriff's sale, were void for want of notice to defendants in the foreclosure suit. The only claim of title on part of defendants herein is based on the void judicial sale. The sheriff's deed was recorded March 28, 1899. Plaintiff offers to pay the mortgage debt and taxes. In the petition it is also alleged: "Prior to January 8, 1908, the said above-described premises were unoccupied, unimproved lands, and the said Herman P. Chelins, or any one claiming under him, had never gone into possession of said premises, had never placed any improvements on said premises, or caused any part thereof to be placed under cultivation, or exercised any right of possession over the same."

Other facts not material to the present inquiry are also pleaded in the petition. The invalidity of the foreclosure proceedings is not controverted on appeal. To justify the sustaining of the demurrer, defendants insist that the statute of limitations began to run from the maturity of the mortgage, as early as June 6, 1898, or at the latest from the recording of the sheriff's deed March 28, 1899 and that,

reckoning from either date, the ten-year period expired before the petition herein was filed May 21, 1912. In support of these propositions defendants cite: *McKesson v. Hawley,* 22 Neb. 692; *Morrow v. Jones,* 41 Neb. 867; *Pleasants v. Blodgett,* 39 Neb. 741; *Eayrs v. Nason,* 54 Neb. 143. On the contrary, plaintiff argues that the statute of limitations did not begin to run until defendants entered into possession of the premises January 8, 1908, and that therefore the action is not barred.

The cases cited do not control the decision in the present case. The contention that the cause of action accrued on the maturity of the debt is at variance with a recent decision of this court. In *Clark v. Hannafeldt,* 79 Neb. 566, the syllabus reads: "An action to redeem from the lien of a mortgage does not accrue to the mortgagor until the mortgagee takes possession of the premises after default in payment, and the action is not barred until ten years from the date of such possession." That case was correctly decided, and the principle of law applicable to the facts should be stated thus: The statute of limitations does not begin to run against mortgagor's right to redeem the mortgaged land until possession thereof is taken under the mortgage.

The position that the statute of limitations begins to run from the recording of the sheriff's deed is likewise untenable. Defendants herein were not in possession prior to January 8, 1908. The title was in plaintiff. The law presumes that the holder of the legal title is in possession of unimproved and unoccupied land. *Butler v. Smith,* 84 Neb. 78; *Herbage v. McKee,* 82 Neb. 354; *Troxell v. Johnson,* 52 Neb. 46; *Yorgensen v. Yorgensen,* 6 Neb. 383. In contemplation of law plaintiff was in exclusive possession prior to the adverse entry of defendants January 8, 1908. The void sheriff's deed was a continuing cloud upon his title. The statute of limitations does not begin to run against an action to remove a cloud from the title of a landowner while he is in exclusive possession. *Batty v. City of Hastings,* 63 Neb. 26; *Dringman v. Keith,* 86 Neb. 476; *Clark v. Hannafeldt,* 79 Neb. 566; *Jackson v. Rohrberg,*

94 Neb. 85. On the face of the petition the action is not barred.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., not sitting.

CHARLES WAKEFIELD, APPELLANT, V. GEORGE W. WAKEFIELD, APPELLEE.

FILED JANUARY 29, 1915. No. 17,970.

Appeal: AFFIRMANCE. A judgment will not be reversed on appeal, where it is the only one sustainable under the pleadings and the evidence.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

John M. Macfarland and *A. J. Kinnersley,* for appellant.

E. H. Westerfield and *R. M. Crossman, contra.*

ROSE, J.

The petition contains two counts one for a balance of $2,300 deposited with Jacquith & Company for the use of defendant at his request under an oral promise by him to pay back the money, and the other for $800 likewise deposited with Lampsen Brothers. At the close of plaintiff's testimony, the trial court directed a verdict for defendant.

Plaintiff asserts that there was error in taking the case from the jury. The parties to the suit are brothers. A portion of the testimony of plaintiff tends to show that he made deposits as pleaded by him, and that defendant promised to return the money with interest. All testimony of this nature, however, was positively contradicted by defendant, while he was testifying as a witness for plaintiff. It is conclusively established that Jacquith & Company and

Lampsen Brothers were bucket-shop keepers, and that the funds in question were, for plaintiff's own use, knowingly deposited with them for gambling purposes in buying and selling grain on margins. The evidence will admit of no other inference. Defendant had no connection with the bucket-shops except as a customer. Courts do not grant relief under the circumstances shown. No other verdict than that rendered could be upheld. The judgment thereon is

AFFIRMED.

MORRISSEY, C. J., BARNES and SEDGWICK, JJ., not sitting.

CHARLOTTE M. MARTIN, APPELLANT, V. SAMUEL B. STARRETT ET AL., APPELLEES.

FILED JANUARY 29, 1915. No. 17,972.

1. **Bankruptcy**: DISCHARGE: DEBTS EXCEPTED. An act of fraud, embezzlement, misappropriation or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it "while acting as an officer" or in a "fiduciary capacity." 30 U. S. St. at Large, p. 550, sec. 17.
2. ———: "OFFICER:" MANAGING PARTNER. The managing partner of a firm composed of two members is not an "officer" within the meaning of that word as used in the bankruptcy act of 1898. 30 U. S. St. at Large, p. 550, sec. 17.
3. ———: TRUSTS: "FIDUCIARY CAPACITY." The term "fiduciary capacity," as used in the bankruptcy act of 1898, applies to technical trusts, and not to those arising by implication of law from the contract of parties. 30 U. S. St. at Large, p. 550, sec. 17.
4. ———: ———: ———: MANAGING PARTNER. During the existence of a partnership formed by two persons for the purpose of conducting a banking business, the managing partner does not act "in any fiduciary capacity," within the meaning of that term as used in the bankruptcy act of 1898. 30 U. S. St. at Large, p. 550, sec. 17.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

James H. Wooley, for appellant.

Garlow & Long, contra.

ROSE, J.

This is a proceeding to revive a judgment, rendered November 3, 1893, in the district court for Merrick county, in favor of the plaintiff for $38,772.03, in a suit brought by David Martin against Samuel B. Starrett and George Wells. The plaintiff died January 29, 1896. His wife, Charlotte M. Martin, succeeded to his rights. The trial court revived the judgment as to Wells, but refused to grant such relief as to Starrett, on the ground that he had been released by a decree in bankruptcy from liability for the debt. The deceased plaintiff's widow is appellant.

Is Starrett's discharge in bankruptcy a defense to revivor? The solution depends on the nature of the debt and on the provisions of the bankruptcy act of 1898. David Martin and Starrett had entered into a partnership for the purpose of operating a bank at Central City; the former furnishing the money and the latter managing the business and controlling the funds for a share of the profits. In the suit wherein the judgment in controversy was rendered, plaintiff sought a dissolution of the partnership and an accounting between the partners. This relief was granted. The principal debts were created by the use of partnership funds lost in gambling on the board of trade in Chicago, both Starrett, as manager of the partnership business, and Wells, as a participant in the gambling transactions, having been held accountable to the plaintiff for the losses thus incurred. Starrett was declared a bankrupt December 12, 1898, plaintiff being his only creditor. In the bankruptcy court the fraudulent nature of the bankrupt's debt was pleaded, but the final discharge was nevertheless granted April 4, 1900. Is the dormant judgment excepted from the operation of the decree in bankruptcy? Under the act of 1898 a discharge releases a bankrupt from all of his provable debts except such as "were created by his fraud, embezzlement, misappropriation or defalcation while

acting as an officer or in any fiduciary capacity." 30 U. S. St. at Large, p. 550, sec. 17. An act of fraud, embezzlement, misappropriation or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it "while acting as an officer" or in a "fiduciary capacity." *Crawford v. Burke,* 195 U. S. 176.

Did the managing partner act as "an officer" or "in any fiduciary capacity," within the meaning of the bankruptcy act? Starrett was called "cashier," but that did not make him an "officer" as that word is used in the act of congress. He was neither a public officer nor an officer of a private corporation. The bank was not incorporated. Under a partnership contract he was manager, having control of the partnership funds and business. In this contractual relation he was not an "officer," within the meaning of the statute. That he did not act in a "fiduciary capacity" in the sense that defeats a discharge in bankruptcy is well settled by rulings of the federal courts. The term as it appears in the act applies to technical trusts, and not to trusts implied by law from contracts. *Chapman v. Forsyth,* 2 How. (U. S.) 202; *Inge v. Stillwell,* 88 Kan. 33, 42 L. R. A. n. s. 1093, and cases cited in note. While a partnership contract implies trust and confidence, as held in *Knapp v. Reed,* 88 Neb. 754, a partner during the existence of the partnership does not by reason of that relation, when managing the funds and the business of the firm, act in a "fiduciary capacity" as understood in the bankruptcy law. *Chapman v. Forsyth,* 2 How. (U. S.) 202; *Barrett v. Prince,* 74 C. C. A. 440; *In re Camelo,* 195 Fed. 632; *Goodman v. Herman,* 172 Mo. 344. The rule applicable to the undisputed facts of the present case has been settled as follows: "Misappropriation by a partner of partnership funds is not a misappropriation by him while acting in a 'fiduciary capacity,' within the meaning of the provision excepting certain debts from the effect of a discharge in bankruptcy." *Karger v. Orth,* 116 Minn. 124. To the same effect: *Gee v. Gee,* 84 Minn. 384; *Pierce v. Shippee,* 90 Ill. 371; *Inge v. Stillwell,* 88 Kan. 33, 42 L. R. A. n. s. 1093.

In holding that the judgment against Starrett was not excepted from the operation of his discharge in bankruptcy and in denying a revivor as to him, the trial court followed the law.

AFFIRMED.

MORRISSEY, C. J., SEDGWICK and HAMER, JJ., not sitting.

EMIL C. AEGERTER, APPELLEE, V. ANTON RONSPIES, APPELLANT.

FILED JANUARY 29, 1915. No. 17,983.

1. **Continuance:** ABSENCE OF WITNESS. The absence of a witness is not ground for a continuance, where his testimony would be inadmissible under the issues.
2. **Sales:** OFFER TO RETURN PROPERTY: WITHDRAWAL OF OFFER. A rejected offer to return a purchased chattel to the seller may be withdrawn by subsequent acts of the purchaser in using and in treating the property as his own.
3. **Appeal:** NOTES: CONSIDERATION: EVIDENCE. "Where a defendant pleads a total failure of consideration as a defense to an action on a promissory note, and his evidence at most tends to prove only a partial failure of consideration, it is not error to refuse to submit that defense to the jury." *Sibley & Davis v. Rodgers*, 90 Neb. 497.
4. **Appeal:** EXCLUSION OF EVIDENCE. Error cannot be predicated on the exclusion of testimony not within the issues.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

C. H. Stewart and *M. H. Leamy*, for appellant.

C. B. Willey, contra.

ROSE, J.

This is a suit on a promissory note for $1,600, dated May 21, 1910, and due January 1, 1911. Plaintiff is the payee and defendant is the maker. The note shows on

its face that it was given for the purchase price of an automobile. Defendant admitted the execution of the note, and pleaded that the consideration to the extent of $100 was for instructions and for storage of the car; that the car was not new, but contained many old parts; that it failed to work properly; that plaintiff agreed to return the note any time during the year in case the car did not work perfectly; that he offered to return the car June 12, 1910; that he had driven it less than 1,000 miles; that plaintiff failed to give proper instructions; that employees of plaintiff replaced new parts with old, while the car was in his garage; that defendant had deposited in a bank, subject to the order of plaintiff, the amount due on the note, upon his putting the car in good running order. At the close of the testimony, the trial court directed a verdict for plaintiff, and defendant appeals.

The overruling of a motion for a continuance on account of the absence of a witness is assigned as error. The assignment must be overruled for insufficiency of the showing. It does not appear that his testimony would have been admissible under any issue raised by the pleadings.

Defendant contends that the verdict should have been in his favor, and that there was error in the peremptory instruction for plaintiff. On the record presented the position is untenable. Execution of the note is admitted. It was given for an automobile. After the alleged offer to return the car, defendant used it for his own benefit, making a number of trips. The evidence does not prove a total failure of consideration, but disproves an effective tender of the car to plaintiff. A rejected offer to return a purchased chattel to the seller may be withdrawn by subsequent acts of the purchaser in using and in treating the property as his own. *Hefner v. Robert,* 76 Neb. 192; *Fannin v. Thomason,* 50 Ga. 614. A partial failure of consideration was not properly pleaded. Under the evidence adduced, there was no error in directing a verdict for plaintiff, the rule being: "Where a defendant pleads a total failure of consideration as a defense to an action

on a promissory note, and his evidence at most tends to prove only a partial failure of consideration, it is not error to refuse to submit that defense to the jury." *Sibley & Davis v. Rodgers,* 90 Neb. 497; *Daniels v. Englehart,* 18 Idaho, 548, 39 L. R. A. n. s. 938.

The exclusion of testimony in a number of instances is assigned as error, but the offered proofs were not within the issues.

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

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98 Neb. 707.
(S.C.)

MARY J. DAVIS, APPELLEE, V. PATRICK MANNING, APPELLANT.

FILED JANUARY 29, 1915. No. 17,926.

1. **Limitation of Actions:** AMENDMENT OF PETITION. If a plaintiff amends his petition, and introduces a new cause of action therein, the statute of limitations will continue to run against such new cause of action until it is brought into the issues. But if the substance of the cause of action stated in the original petition is retained, the filing of the original petition and service of summons therein will stop the running of the statute as to such cause of action.

2. **Appeal:** VERDICT: EVIDENCE. Although the evidence of facts necessary to support the verdict of a jury is not conclusive, so that it seems probable that the court might have arrived at a different conclusion, still, if there is substantial evidence of all facts necessary to support the verdict, the judgment thereon cannot be set aside by this court, unless upon the whole record it appears that the verdict is clearly wrong.

3. **Landlord and Tenant:** DEFECTIVE PREMISES: LIABILITY OF LANDLORD. If a landlord rents a house in a dangerous condition, and knows at the time, or ought to know from facts within his knowledge, that it is dangerous, and such dangerous condition is not known to the tenant, and the conditions are such that an ordinarily prudent person, situated as the tenant was, would not know the danger, the landlord is liable for damages caused to the tenant, without fault on her part, by reason of such dangerous condition.

4. ———: ———: INJURY TO TENANT: SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is found sufficient to support the verdict.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Gurley & Woodrough and *Dunham & Aye,* for appellant.

W. W. Slabaugh and *John W. Battin, contra.*

SEDGWICK, J.

In December, 1906, the plaintiff, who was then living in a house in Omaha, which she rented from the defendant Patrick Manning, fell on the kitchen floor. A little less than four years thereafter she began this action in the district court for Douglas county against Manning and the agents who had assisted him in renting the property and collecting the rents. A demurrer was filed to her first petition and sustained, and afterwards she filed an amended petition. In this amended petition she alleged that she rented the house from the defendant Manning through his agents, the other defendants, and that a part of the floor of the kitchen, near the stove, was in a dangerous and defective condition; that the "under portion of the boards of the floor were rotted, leaving but a thin upper part solid and apparently strong; that the floor at said place was near to the ground; that the defendants, and each of them, knew, and should have known by the exercise of reasonable diligence, of the dangerous and defective condition of said floor at said place; and that the defendants, and each of them, fraudulently failed to notify the plaintiff of the defective and dangerous condition of said floor at said place; that defendant Manning constructed said building about the year 1875, lived in it for many years, and knew of the nearness of the floor to the ground, and that the under parts of said floor would rot;" that she did not know the condition of the floor; and that "while she was preparing her breakfast, and was standing near the front of her stove and the door into

said pantry, and was about to step from the stove to the said pantry, and while plaintiff was standing on said floor whereof the boards were, as aforesaid, rotten, defective and dangerous, a part of one of the floor boards broke through, causing a hole about 7 by 2½ inches in size, into which the heel and a portion of plaintiff's left foot passed, thereby throwing plaintiff, while the heel of her foot remained in said hole, onto the floor on her left side, thereby crushing and bruising her left side, and fracturing and breaking her left thigh bone, and fracturing two of the lower ribs on her left side," and other injuries. The defendant Manning denied these allegations, and alleged that the house was well built and of good materials, and that "said plaintiff had occupied and lived in said house since about the 1st day of May, 1905, and for a long time prior thereto, and that the condition of said premises was fully known to plaintiff and was open and obvious to her during all of said times; * * * that the injuries, if any, which plaintiff received arose from and were due to dangers and risks which were open and obvious and known to plaintiff and assumed by her; * * * that the injuries, if any, received by plaintiff were occasioned by and due to her own negligence and want of care." The other defendants were dismissed from the case by the court. There was a verdict in favor of plaintiff and against the defendant Manning, and judgment was entered thereon, and the defendant has appealed.

1. The first objection urged is that the plaintiff's action was barred by the statute of limitations, the amended petition having been filed more than four years after the alleged cause of action accrued. There is no merit in this contention. The amendment of the petition consisted in omitting an allegation of defects in other parts of the kitchen floor than the part where the plaintiff was injured, and omitting an allegation of the plaintiff's knowledge of those defects. There was no change in the cause of action, and it must be deemed to have been begun upon the filing of the first petition.

2. The principal contention is that the verdict and judgment are not supported by the evidence. The evidence was, and it appears to be conceded, that the defendant built this house about 25 years before the accident happened, and that it was well built and of good materials, and that it was supposed by the defendant that the kitchen floor was in a safe condition. There was, however, evidence from which the jury might find that at the time alleged in the petition the plaintiff was engaged in her ordinary household occupation in the kitchen, and, in attempting to go from the stove to a pantry close by, her foot broke through the floor, causing her to fall; that she was unable to remove her foot from the break in the floor and was released by her daughter and another woman; that she suffered injuries substantially as alleged in her petition; that the kitchen was a one-story addition to the main part of the house; that the kitchen floor was near the ground, and the space under the floor was inclosed with a wall and was without any ventilation, and that the drainage of a part of the yard was toward the house, so that it might be anticipated that the space below the floor would be in a damp condition; that the defendant built his house himself and knew of these conditions. The defendant contended that the plaintiff must have slipped or stumbled on the floor, which was the cause of her fall; that the floor was made of first-class hard white pine lumber and was in sound condition, and could not have broken through with the plaintiff. He produced some of the boards of the floor in evidence. They were identified by the reporter, and upon examination appeared to be sound and in good condition. There is, however, substantial evidence, as we have said, by at least three witnesses that there had been openings in other parts of the kitchen floor which had been covered with tin, and that the floor at the place where the accident occurred was smooth and appeared to be sound upon the surface, but gave way under the weight of the plaintiff as alleged, and upon examination was found to be damp and soft on the under side and so decayed as to in fact have but little

strength. There was evidence that the plaintiff did not know, and had no means of knowing, the unsafe condition of the floor at the place where the accident occurred. The defendant contended that he had no knowledge that the floor was in an unsafe condition.

The court instructed the jury that, in order to recover, the plaintiff must prove by a preponderance of the evidence, among other things: "That the defendant knew of said defect in said kitchen floor at the time of the last leasing of said premises, or should have known of the defect in said floor by the exercise of reasonable care in observing the natural law of decay of said kitchen floor." The plaintiff's contention was that the defendant, having built the foundation under the kitchen as he did, without ventilation and with the floor so near the ground and with the conditions making it possible that there would be dampness under the floor, if he had taken notice of "the natural law of decay" he would have known, or ought to have known, that the floor was in an unsafe condition. The defendant contends that this issue was not plainly and fairly submitted to the jury. The language of the instruction above quoted was substantially taken from instructions requested by the defendant, and there is nothing in the record, so far as we have observed, that indicates that the jury failed to comprehend the precise questions of fact that were controverted by the parties and upon which their verdict must depend.

The plaintiff's original petition was in evidence, and it contained the allegation that in other parts of the floor there were cracks and openings, and that she had requested the defendant's agents to repair the same. The defendant contends that this proves that the plaintiff had notice of the condition of the floor, and was therefore guilty of contributory negligence. The plaintiff in her evidence at the trial testified that she knew that these cracks existed in other parts of the floor and that they had been repaired, but she insisted that she did not know that it was because of any decayed condition of the floor that these cracks existed, and this question of the plaintiff's knowledge of the

condition of the floor appears to have been fairly submitted to the jury.

The defendant has furnished us with an extensive and interesting brief. It discusses several questions of law which seem to be sound. These questions are not controlling here. If the landlord rented the house in a dangerous condition, and knew at the time, or ought to have known from facts within his knowledge, that it was dangerous, and such dangerous condition was not known to the tenant, and the conditions were such that an ordinarily prudent person, situated as the tenant was, would not have known the danger, the landlord is liable for damages caused to the tenant, without fault on her part, by reason of such dangerous condition. These things appear to have been found by the jury in the plaintiff's favor. It must be conceded that upon some of these questions of fact the plaintiff's evidence was not conclusive; but, as has often been decided, we cannot set aside a verdict of the jury because it seems probable that the court might have arrived at a different conclusion upon the facts presented. If there is substantial evidence supporting the findings of the jury, their verdict must be conclusive, unless upon the whole record it appears that it is clearly wrong.

We cannot say that the verdict of the jury is not supported by the evidence, and, no reversible error appearing in the record of the trial of the case, the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and LETTON, J., not sitting.

CORDELIA PEYTON, APPELLEE, V. LACEY E. PEYTON, APPELLANT.

FILED JANUARY 29, 1915. No. 17,937.

1. **Divorce:** CULPABILITY OF PLAINTIFF. A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce, even if the conduct of the other

party has been grossly more culpable. In such case the court will deny relief to either.

2. ———: APPEAL: CONFLICTING EVIDENCE. In such action, if the evidence is principally oral and is conflicting, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court upon review of the evidence.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

Brome & Brome, for appellant.

John M. Macfarland and *Lambert, Shotwell & Shotwell, contra.*

SEDGWICK, J.

The plaintiff began an action in the district court for Douglas county against the defendant, and afterwards filed an "amended petition" therein. The original pleadings are not contained in the transcript. In this supplementary petition she asked for a divorce from the defendant, and alimony, principally upon the ground of cruelty. The defendant filed an answer and cross-petition asking for a divorce from the plaintiff. Upon the trial the court found that neither party was entitled to any equitable relief, and that the plaintiff was without means of support, and dismissed the action, judging the costs against the defendant. The defendant has appealed.

In his cross-petition the defendant alleged that the plaintiff and defendant were married on the 25th day of July, 1905, and that they have no children; that the plaintiff was addicted to the excessive use of intoxicating liquors and was frequently intoxicated and in drunken condition; and "that, by reason of plaintiff's conduct in this behalf and her frequent unexplained absences from her home, controversy arose between plaintiff and defendant, and defendant remonstrated with plaintiff, and sought to persuade her to abandon and cease her conduct and habits in this respect, but without success; * * * that thereafter, and on about the 1st day of June, 1911, and at various

times thereafter, plaintiff proposed to defendant that she would cease the use of intoxicating liquors and conduct herself properly in the future if defendant would resume marital relations with her, and thereupon defendant, relying upon the promises and protestations of plaintiff, was induced to and did resume marital relations with plaintiff, returned to his home at number 315 Park avenue in the city of Omaha, and plaintiff and defendant there resided together as husband and wife until the 15th day of January, 1912; that plaintiff did not cease the excessive use of intoxicating liquors, and was frequently absent from her home without any cause or reason therefor, and frequently returned in an intoxicated and drunken condition." He then alleged that the plaintiff had been guilty of adultery with different men, specifying several instances of the commission of that crime by her. He asked for an absolute divorce. There seems to be no doubt that the allegations against the plaintiff are sufficiently proved to justify the findings of the trial court that she was not entitled to any relief in a court of equity.

The defendant insists that the charges which she has made against him are not sustained by the evidence. A large amount of evidence was taken. It is contained in something over 800 sheets of type-written matter. It is very conflicting and we cannot attempt to give anything like an analysis of it. It appears without substantial conflict that, while the plaintiff was living with a former husband, she and this defendant were frequently together. Their relations were very intimate, and at about the time that she obtained her divorce from her former husband the plaintiff and this defendant began secretly living together as husband and wife, and so continued for several years before their marriage.

Counsel for defendant insists that this conduct of the parties before their marriage ought not to be counted against the defendant in this case. If his general conduct and his treatment of his wife since their marriage have been in all respects exemplary, this suggestion would be entitled to consideration. Their former sinful conduct

illustrates their character, and might furnish a basis for their mutual jealousies and brutal quarrels which continued during the most, if not all, of their married life. There is no doubt under this evidence that they habitually used personal violence against each other and the grossest kind of vituperative language. The plaintiff testified that he frequently beat her with great violence. On many occasions, she says, he knocked her down, choked and otherwise abused her. He admits using violence, but says that it was upon occasions when she was intoxicated, and was for the purpose of restraining her from doing violence against him. He admits that on one occasion he struck her a severe blow in the mouth, but says they were quarreling, that he was trying to restrain her, and the blow was with the back of his hand and was accidental. She frequently accused him of infidelity with the young woman who was working for her. She testifies to many admissions of his in that regard, and also admissions of the girl, which they deny. She does not testify to any circumstances indicating such a crime or indicating any disposition to commit it. In one of these quarrels in the presence of their family physician she accused him vigorously, and the plaintiff and the physician both testify that the defendant admitted his infidelity with the girl. He denies having made such an admission, but says that his wife so often accused him that on this occasion he may have said: "Well, let it go at that." If we consider the admitted circumstances as the evidence of the plaintiff and her daughter would characterize them, the defendant's conduct was grossly and unreasonably violent and abusive, and in many respects wholly improper. In the light of the defendant's testimony, when we consider the wholly abandoned character and conduct of the plaintiff, the defendant's exhibition of temper and violence might possibly be excusable. The trial court appears to have given the evidence the most conscientious and careful consideration. The evidence is mostly the oral testimony of witnesses in open court. These witnesses radically disagree as to the character of the various actions described. It is impossible to tell how to understand these

witnesses and determine the disposition of the defendant and the character and motives of his conduct toward the plaintiff during the latter part of their living together as husband and wife. The trial court saw these witnesses and heard their testimony. He frequently questioned the parties themselves, with the evident purpose of ascertaining their disposition toward each other, and the nature of the conduct of defendant toward his wife, making full use of the advantages he had for determining the truth of their testimony and the proper construction to be given it—advantages which this court does not possess. He has found that under all the circumstances the defendant is not entitled to the relief he asks. We cannot with any satisfactory degree of certainty come to a different conclusion.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and LETTON, J., not sitting.

J. McC. PRESTON, APPELLEE, V. HARLAN COUNTY ET AL., APPELLANTS.

FILED JANUARY 29, 1915. No. 17,948.

1. **Taxation:** PERSONALTY OF NONRESIDENT. Personal property in the possession of the owner at his place of residence in another state is not subject to taxation by the authorities of any county in this state.
2. **Evidence** examined, and *held* to sustain the judgment of the district court.

APPEAL from the district court for Harlan county: ERNEST B. PERRY, JUDGE. *Affirmed.*

O. E. Shelburn and *W. W. Wenstrand,* for appellants.

R. L. Keester, contra.

HAMER, J.

This case is one where the plaintiff filed a petition to enjoin the treasurer of Harlan county from collecting certain personal taxes levied against him for the years 1910 and 1911. Plaintiff alleged that he was, and had been, a nonresident of Harlan county since the year 1908; that he was a *bona fide* resident of the state of Colorado, and has had no property in Harlan county since his removal therefrom; that the county assessor returned for taxation against him "all notes secured by mortgages," amounting in round numbers to $42,000, without any notice to plaintiff; that plaintiff never listed said property for taxation in Harlan county, and yet the county authorities levied taxes on said so-called assessments, and the county treasurer was about to institute proceedings to collect said taxes. The answer admitted the allegations of the petition, except as to the matter of the plaintiff's residence, and alleged that plaintiff was a resident of Harlan county, Nebraska, and owned the notes secured by mortgages. On this issue the case was tried. The district court found for the plaintiff and enjoined the proceedings to collect the alleged taxes.

The plaintiff, by his own evidence in the form of a deposition, clearly showed that he had sold his home in Harlan county in the spring of 1908, and had removed to the city of Lincoln, where he registered at the fall election of that year; that he then removed to Colorado Springs, Colorado, where he has ever since resided, except some time spent on visits to California; that he has never been in Harlan county, except to pass through there on the cars, since he sold his residence situated therein; that all notes secured by mortgages which he owns have at all times been in his possession at his home in Colorado. His testimony was corroborated by many other witnesses who reside in Harlan county. The defendants sought to prove, on cross-examination of the plaintiff, that he had not listed his property for taxation elsewhere. This the plaintiff denied. The testimony also shows that the assessor made up the so-called assessments from an examination of the county records and entered the lump sum of $42,000 on the assess-

ment rolls without identification or description other than as above quoted; that he never gave any notice to the plaintiff of the so-called assessments. Under the pleadings, the only question presented for trial was that of plaintiff's residence. The assessment having been made before the present statute relating to the taxation of mortgages took effect, the decree of the district court is right, and it is

AFFIRMED.

MORRISSEY, C. J., not sitting.

S. A. FOSTER LUMBER COMPANY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,981.

Railroads: INTERSTATE SHIPMENTS: EXCESSIVE CHARGES: REMEDY. A shipper cannot maintain an action in the courts of this state to secure reparation for excessive freights collected on an interstate shipment, where the rate charged was in accordance with the published tariff of the carrier as authorized by the interstate commerce commission and no order for a refund or reparation has been made by said commission.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

W. B. Price and *Ray J. Abbott,* for appellant.

Edson Rich, B. W. Scandrett and *C. B. Matthai, contra.*

MORRISSEY, C. J.

The appellant, S. A. Foster Lumber Company, engaged in business at Callaway, Nebraska, on the 23d day of June, 1907, applied to the connecting line of the appellee at Wrencoe, Idaho, for a car of 30,000 pounds net minimum carrying capacity in which to ship 25,780 pounds of lumber from Wrencoe, Idaho, to Callaway, Nebraska, and at that time paid to the proper officer of the carrying company the full tariff rate for transporting such car in the sum of $140. For its own convenience the carrier furnished a car with a minimum carrying capacity of 60,000 pounds. The

tariff fixed and established by the interstate commerce commission for the car so furnished was $270. After the shipment was delivered the appellee demanded the further sum of $130 to cover the difference between the amount paid and the tariff so fixed. This sum was paid under protest by the shipper, on October 31, 1911, making a total paid for the transportation of said car of the sum of $270. The connecting line of the appellee did not have available a car with a net minimum carrying capacity of 30,000 pounds at the time this shipment was made, and the larger car was furnished solely for the convenience of the carrying company, and the smaller car would have answered the requirements of the shipper equally as well. Without making complaint to the interstate commerce commission or demanding reparation of that tribunal, appellant brought suit in the courts of this state to recover back the sum of $130 which it had theretofore paid to appellee under protest. A jury was waived in the district court and the cause was tried to the court. The findings and judgment of the trial court being for the appellee, the appellant has brought the case here on appeal.

It is agreed that the rate charged is the proper one for a car of the capacity furnished; but it is contended by the appellant that the car ordered would have answered equally as well for the shipment as made, and that the shipper cannot furnish a larger car than the one ordered and then collect a higher tariff than what it would be entitled to collect for the car ordered. The appellee admits that the car furnished rendered no greater or better service than the car ordered would have rendered, but says that, under the act of congress known as the "Interstate Commerce Act," it is not permitted to make reparation in the absence of an order so to do from the interstate commerce commission.

It is contended by the appellant that the question of rates and tariffs is not involved in the controversy. It says that the appellee's published rates for the car of 30,000 pounds net minimum carrying capacity and for a 60,000 pounds net minimum carrying capacity are satisfactory to it, but that appellant had the right to order

and get a car of 30,000 pounds net minimum carrying capacity, and if the carrier used a larger car it is a matter in which the appellant is not concerned. But the trial court very properly treated the question as one involving the reasonableness of a tariff rate, and a like rule is laid down by the interstate commerce commission in *American Lumber & Mfg. Co. v. Southern Pacific Co.*, 14 I. C. C. Rep. 561.

The railroad company in making the collection for a car of larger capacity did what it was bound to do under the interstate commerce act and its tariff rates as published, and the published tariff rates, which both the shipper and the company are bound to know, are the rates which must be collected in the first instance, the charges being no longer the subject of contract but of law. It follows that the appellant's request for reparation is one that must be made in the first instance to the interstate commerce commission. Conference Ruling 220, June 7, 1907; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 9 Am. & Eng. Ann. Cas. 1075.

In the case of *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, Mr. Justice Van Devanter, speaking for the court, says: "The acts, ch. 104, 24 St. at L. 379; ch. 382, 25 St. at L. 855; ch. 61, 28 St. at L. 643; ch. 708, 32 St. at L. 847, whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the interstate commerce commission with authority to receive complaints against rates so established, and to inquire and find whether they were, in any wise violative of the prohibitions of the act, and, if so, what, if any, injury had been done thereby to the

person complaining or to others, and further authorized the commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation, by an action in the circuit court of the United States, if the carrier failed to comply with it.

"Thus, for the purpose of preventing unreasonable charges, unjust discriminations and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any nonconformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

"When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the interstate commerce commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the commission, and would be destructive of the uniformity and equality which the act was designed to secure."

The judgment of the district court is correct and is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JOHN F. KOLTERMANN, APPELLEE, V. WILLIAM B. CHILVERS ET AL., APPELLANTS.

FILED FEBRUARY 12, 1915. No. 18,001.

Ejectment: APPEAL: CONFLICTING EVIDENCE. In an ejectment suit, where the evidence is conflicting as to adverse possession, the general rule applies that the verdict of the jury will not be set aside unless it appears to be clearly wrong.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

H. C. Brome and *M. H. Leamy,* for appellants.

Fred H. Free and *H. F. Barnhart, contra.*

BARNES, J.

This was an action in ejectment tried in the district court for Pierce county. The plaintiff alleged in his petition that he was the owner of the southwest quarter of the northwest quarter of section 10, and the south one-half of the northeast quarter of section 9, all in township 26 north, of range 2 west of the sixth P. M., situated in Pierce county. This description, according to the government survey, embraced the land in question, which contains 13.246 acres, and plaintiff alleged that ever since the 25th day of October, 1901, the defendants had kept him out of possession thereof. The answer was a general denial. On the issue thus joined, there was a jury trial and a verdict was returned for the plaintiff. Judgment was rendered on the verdict, and the defendants have appealed.

The questions presented in this case are: (1) The true location of the boundary line between the plaintiff's land described in his petition and the land owned by defendants, which lies immediately south of and adjoining plaintiff's premises. (2) The statute of limitations.

Defendants contend that the verdict of the jury is not sustained by the evidence. The bill of exceptions discloses

that the parties are all old residents of Pierce county. The plaintiff's evidence showed that the person from whom he obtained his title homesteaded the land and obtained title thereto from the United States; that the land was conveyed by plaintiff by a warranty deed. Therefore, there was no question as to plaintiff's title. On the other hand, defendants showed a perfect title to their land adjoining plaintiff's premises on the south. It appears that the land was farmed on both sides of the boundary line, and in 1901 the defendants built a fence between their premise and the plaintiff's land, which they testified was placed on the turn-row between the fields as they had been theretofore cultivated. The plaintiff insisted that the fence was not on the true boundary line, but was placed so far north of the true line as to include 13.246 acres of his land. The evidence was conflicting, but to our minds the testimony of W. H. Lowe, a competent surveyor who resurveyed the land belonging to the litigants, was sufficient to sustain the verdict. Mr. Lowe described the manner in which he ascertained the ancient government corners and how he reestablished and marked them. He subdivided the sections in question, and testified positively that the defendants' fence was about seven rods north of the true boundary line. Other witnesses who had seen the ancient corners, and claimed to know the boundary line, corroborated the evidence of the surveyor. The witnesses did not all agree upon this question, but we must decline to set aside a verdict rendered on conflicting evidence.

As to the statute of limitations, it appears that defendants' fence, inclosing the land in controversy, was built in 1901. This action was commenced in 1904. At that time the statute authorized two trials in an ejectment suit. This accounts for the length of time the action was pending before final judgment was rendered. The defendants contended that they had exclusive adverse possession of the land, from the time of purchasing it in 1893, as far north as the fence was placed. In this they were supported by several witnesses. The plaintiff contended that the fence was placed farther north so as to include the strip of land

of which defendants had not had exclusive adverse possession before the fence was built, and that each party had in fact had control of the land up to the true line. Upon this fact there was a substantial conflict, and we cannot say that the verdict is so clearly wrong as to require a reversal.

It follows that the judgment of the district court was right, and is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

ROBERT C. JOERGER ET AL., APPELLEES, V. BETHANY HEIGHTS, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,015.

1. **Municipal Corporations:** UNPLATTED LAND: RIGHT TO DETACH: ESTOPPEL. The fact that unplatted land used exclusively for agricultural purposes was included in the incorporated limits of a village with the tacit permission of a former owner does not estop his grantee from proceeding under section 5090, Rev. St. 1913, to have it disconnected therefrom.
2. **Appeal:** AFFIRMANCE. A judgment of the district court in such proceeding will not be reversed, in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of law. *Gregory v. Village of Franklin*, 77 Neb. 62.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

J. B. Strode and *G. E. Hager*, for appellant.

George A. Adams and *Morning & Ledwith, contra.*

BARNES, J.

Robert C. Joerger and five other persons commenced separate actions in the district court for Lancaster county against the village of Bethany Heights, under the provi-

sions of section 5090, Rev. St. 1913, to disconnect their lands from said village. Issues were joined and by agreement all of the actions were consolidated and were tried as one case. The district court found for all of the plaintiffs, except B. L. Paine, and rendered judgments in their favor. The defendant has appealed from the judgments rendered in favor of Therza Henderson and Samuel B. Tanner, and contends that the judgments from which its appeals have been prosecuted are not sustained by the evidence and are contrary to law.

The bill of exceptions discloses that Bethany Heights, the seat of Cotner University, is a village situated in Lancaster county about five miles north and east of the city of Lincoln, and has a population of 1,200, including about 300 students attending the university. The village was incorporated in 1890, and there was included in the corporate limits much unplatted farm land, of which the premises of the appellees are a part. The principal street or highway, passes through the village from north to south, and is called Saunders avenue. Holdrege street, which is practically the south boundary of the settled part of the village, runs east and west. Vine street also runs east and west, and is a half mile south of Holdrege street. The village is connected with the city of Lincoln by two lines of street railway, one owned by the Interurban Railway Company, and the other by the Lincoln Traction Company. The land belonging to the appellee Tanner is situated wholly south of Vine street, and the premises of the appellee Henderson are situated directly west of the land owned by Tanner. None of this land has ever been subdivided into lots and blocks, either by the present owners or their grantors, but is all farm land used for the purpose of raising wheat, oats, corn, alfalfa and other farm products. The appellee Tanner has a house and other improvements on his 80-acre tract, while there are no improvements in the way of buildings on the Henderson tract. None of the sidewalks are extended from the settled part of the village to either the Henderson or the Tanner tract. No village improvements, such as water-works, electric

lights, or other village conveniences, are situated on or near either of these tracts of land. The line of the Missouri Pacific Railway Company runs east from the city of Lincoln through the lands in question, but there is no permanent depot or other improvements situated thereon, except a sort of flag station, or what is called a box car station, where freight which is consigned to the village is sometimes unloaded. The lands are not urban in character, but are farm lands, and are not in any way connected with the village.

The appellant cites, in support of its contention, *State v. Village of College View,* 88 Neb. 232, and argues that this case is decisive of the right of the appellant to retain the land in question within its corporate limits. The facts in that case, however, are different from those in the case at bar. In that case it was said: "A line of the Chicago, Burlington & Quincy Railway Company's railway runs through the southern part of the village about a mile distant from the post office, and the relator's tract of land, which contains about 43 acres, lies immediately north of the railway company's right of way. A sidewalk extends along the east side of the highway immediately east of the relator's land, northward through the business part of the village, and street lights are maintained to within 40 rods of his premises. The land abutting the east side of this highway is subdivided into tracts of from one to five acres each."

An examination of the plat contained in the bill of exceptions in this case shows, when taken in connection with the oral evidence, that all the land lying south of Ash Grove street, or avenue, although shown to be platted in blocks or lots by the exhibit, with the exception of one square of four blocks, is used as farm lands and always has been. The appellees show beyond question that none of their land has ever been platted and no plat thereof has ever been recorded; that their farms are in no way connected with the village, but are, and always have been, used as agricultural lands; that the village is attempting to prevent them from disconnecting their farms therefrom,

as was said in *Village of Osmond v. Smathers*, 62 Neb. 509, for the sole purpose of retaining them for taxation.

It is contended by the appellant that the appellees are estopped to disconnect their land from the village because they have paid village taxes for many years, since the village was incorporated without protest. Where the owner of unplatted land has used it exclusively for agricultural purposes for some years, but has tacitly submitted to its inclusion in the incorporated limits of a town, he is not estopped from proceeding under the statute to have it disconnected therefrom. *Barber v. Village of Franklin*, 77 Neb. 91; *Gregory v. Village of Franklin*, 77 Neb. 62; *Village of Osmond v. Smathers, supra.*

As we view the evidence, it cannot be said that the district court committed an important mistake of fact; neither was that court guilty of an erroneous inference of law. The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ABRAHAM KADNER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,016.

1. **Carriers:** INJURY TO PASSENGER: RIGHT TO RECOVER: CONTRIBUTORY NEGLIGENCE. It is not such negligence for a passenger to stand on the front step of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of the servants of the street car company or of other persons who are crowded upon the platform of the car.

2. ———: ———: NEGLIGENCE. It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars. *Pray v. Omaha Street R. Co.*, 44 Neb. 167.

3. ———: ———: ———: PRESUMPTION. A person standing on the steps of a moving street car, being unable to secure a seat or stand-

ing room within, is presumed to be there with the consent of the servants in charge of the train.

4. ———: ———: ———: QUESTION FOR JURY. The plaintiff, a lad 12 years of age, went to the corner of Twenty-fourth and Lake streets, in the city of Omaha, in order to take a car which would transport him to the place where he was attending school. When the car reached the place where he, with others, was waiting, it came to a stop, thus inviting him to become a passenger thereon. Being unable to get inside of the car, he secured standing room on the front steps of the car, holding onto the dashboard and the handle attached to the body of the car. When the car reached Twentieth street, it swung around the corner onto that street, and the movement of the car caused the passengers who were crowded on the front platform to sway outward against the plaintiff, and he was thus forced off the car, fell to the pavement, and received the injuries complained of. *Held*, That the questions c the negligence of the street car company and of the contributory negligence of the plaintiff were for the jury.

5. Jury: VOIR DIRE: CHALLENGE. The rulings of the court on the impaneling of the jury were without error.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell,* for appellant.

J. C. Kinsler and *Martin L. Sugarman, contra.*

BARNES, J.

This was an action brought by one Abraham Kadner, a boy about 12 years old, by his next friend, to recover damages against the street car company for negligence, which, it was alleged, caused his injuries.

The petition alleged, in substance, that the defendant was negligent in allowing its car to become overcrowded with passengers and in operating the car in such a manner as to cause the plaintiff to be pushed, or thrown, to the ground and under the wheels of the moving car, thus causing his injuries. The answer was a denial of the acts of negligence alleged in the petition, and it was further alleged that plaintiff was not a passenger, but was attempting to steal a ride, and was pushed off the car by one not a

passenger at the time of the injury. It was also alleged that plaintiff's injuries were caused by his own contributory negligence. The reply was, in substance a general denial. The cause was tried in the district court for Douglas county and a verdict was returned for the plaintiff in the sum of $4,125. Judgment was rendered on the verdict, and the defendant has appealed.

The record discloses the following facts: In September, 1910, the defendant was operating a double-track street car line running east and west on Lake street, which turns south on Twentieth street, in the city of Omaha. This line was known as the Dodge street line, and was much used by pupils who attended the various public schools. Plaintiff was living with his parents on Twenty-fourth street about half a block south of Lake street, where they kept a grocery store. At that time he was attending the Lake school. He assisted his stepfather at the store during the holidays and periods of recreation. A few days before the accident, which happened on the 26th day of September, 1910, plaintiff sprained his ankle and was obliged to remain at home from school until the following Monday morning. It was already quite late when the plaintiff decided that it would be best for him to go to school that day on the street car. His stepfather gave him the money with which to pay his fare, and he went across to the southeast corner of Twenty-fourth and Lake streets, where a large number of other school children were waiting for the east-bound car. When the car arrived, it came to a stop at the regular stopping place on the east side of Twenty-fourth street. The car was already crowded to its full capacity and the platforms were filled with passengers. The plaintiff went first to the rear platform, but by the time he got there it was so crowded that it was impossible for him to get a place even on the rear step of the car. He then went to the front platform, which was also crowded with passengers, but, with the assistance of another boy, who was attending the high school, he managed to get what seemed to be a good, safe place to stand on the front end of the car. He had both feet on the step and took hold of

the handles with both hands, one hand on the handle attached to the body of the car and the other on the handle on the front end of the car. The conductor took on as many passengers at this point as the car platforms and steps would hold. The motorman was so pressed, crowded and hemmed in by the passengers on the front platform that it was impossible for him to see a person on the front step of the car. Very shortly after the plaintiff got in what seemed to him a safe position on the front step of the car, the conductor rang the bell and the motorman started the car east toward Twentieth street. The plaintiff had his money in his pocket ready to pay his fare. The conductor was somewhere inside of the car collecting fares from other passengers. The car proceeded east until it came to a switch located on Lake street just west of Twentieth street. It was necessary to stop the car at that place in order to throw the switch so as to permit the car to swing around the corner and go south on Twentieth street. When the car was stopped at the switch, the front platform was so crowded that the motorman could not throw the switch himself, so he arranged with a boy on the street to do it for him. The boy who threw the switch wanted to go down town, and the motorman waited for him to board the car and in some manner he crowded on the front platform. The car was started and swung around the curve at increasing speed. It did not make the usual stop, and as it swung around the curve the passengers who were crowded on the front platform surged out to the west and were pushed and thrown against the plaintiff so that he was forced to let go his hold on the handles of the car. He fell beneath the wheels in such a way that his left foot was mangled and crushed so that it became necessary to amputate the leg between the foot and knee. The toes of his right foot were also bruised and crushed. The motorman testified that he had no intention of bringing his car to a stop at the usual stopping place on the south side of Lake street; that the car was loaded; that he had all that could be taken on at Twenty-fourth and Lake streets, and that he intended to go right on down town. The car was proceed-

ing at such a rate of speed that the motorman was unable to stop it until it got about a block south of Lake street, although he was promptly advised by one Kenneth Craig that the car had run over the plaintiff.

At the close of the evidence the defendant requested the court to direct a verdict in its favor because the facts proved failed to establish any actionable negligence on its part. The request was overruled and the ruling is assigned as error. In support of the assignment the defendant cites *McCumber v. Boston Elevated R. Co.*, 207 Mass. 559, *Seale v. Boston Elevated R. Co.*, 214 Mass. 59, *Huber v. Cedar Rapids & M. C. R. Co.*, 124 Ia. 556, and *Lehberger v. Public Service R. Co.*, 79 N. J. Law, 134. The *McCumber* case seems to be most relied on. In that case it was said: "The plaintiff voluntarily and intelligently became a passenger upon a car so crowded that she could not get a seat, and knew that perhaps she might be obliged to stand in the vestibule. This was not negligence on her part, but by doing so she assumed whatever obligation or risk was incident to that condition. * * * It is not negligence on the part of a carrier in the present state of transportation to permit passengers to come upon cars which are already crowded. * * * That there was some pushing in the effort to pass the plaintiff is not significant. It is only when done in a disorderly way that it becomes of consequence. Hence there was no evidence of negligence on the part of the defendant." The other cases cited seem to, in a way, support the rule announced in the *McCumber* case.

So far as this court is concerned it has evidently repudiated that doctrine. In *Pray v. Omaha Street R. Co.*, 44 Neb. 167, it was held: "It is not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of persons in charge thereof." It was further held: "It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars. A person standing on the

steps of a moving street car, being unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train." It was also held in that case: "Street railway companies in this state are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injuries to passengers."

In the above case the plaintiff, a lad 14 years of age, boarded the defendant's train at South Omaha, bound for the city of Omaha. When he reached the train, which was waiting at the terminus of the line, it was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made, four blocks distant, he stepped off the train to assist a fellow passenger to alight, and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately and secured standing room on the front step of the trailer, holding onto the dashboard and to the iron rail attached to the car for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to relinquish his hold, and fell, receiving the injuries complained of. It was there held that the question of negligence was for the jury and it was error to direct a verdict for the defendant. This rule is supported to some extent by *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, and *East Omaha Street R. Co. v. Godola*, 50 Neb. 906. We are constrained to follow the rule in those cases, and we therefore hold that the motion for a directed verdict was properly overruled.

Defendant contends that it was not guilty of negligence by reason of any movement of the car which was consistent with its proper management under the circumstances. This question seems to have been settled by the opinion in the *Pray* case, *supra*. If the movement of the car was such as to cause the passengers, who crowded onto the platform, to force the plaintiff from the steps of the car where he had obtained a foothold, then the question of negligence was one for the determination of the jury and this assignment must fail. Therefore it was not error for the court to

refuse to instruct the jury as requested by the defendant on that point.

It is also contended that the court should have directed a verdict in defendant's favor because the plaintiff was not crowded from the car by any act of its trainmen, but was in fact crowded from the step by a stranger who attempted to board the car. There was some testimony which tended to support that theory, but the evidence as a whole on that point was conflicting, and therefore that question was properly submitted to the jury.

It is further contended that the court erred by not instructing the jury that the plaintiff was guilty of contributory negligence in getting upon the front step of the crowded street car, he having been admonished not to get onto a crowded car. We find nothing in the record tending to show that the defendant's servants gave plaintiff any warning of that kind. On the contrary, they paid no attention to his movements.

The opinion in the *Pray* case, *supra,* holds, in substance, that a boy 14 years of age was not guilty of contributory negligence. In the case at bar the plaintiff was only a little more than 12 years old, and while we might be constrained to hold that a person of mature years and judgment would be guilty of contributory negligence, under the circumstances of this case, we think, where the plaintiff was immature in years and without discretion, the question of contributory negligence was properly submitted to the jury.

Finally, it is contended that the court erred in not sustaining defendant's challenge to the juror Haynes. The record shows that the juror, when examined by counsel for plaintiff, stated that he had a kind of general prejudice against corporations, but he had no prejudice of any kind against the defendant street railway company; that he knew nothing about the case on trial; that he could try the case fairly and impartially and without regard to the feeling referred to; that he could try the case as fairly and impartially as he could one between two individuals; that he could try the case on the evidence and the law alone

without regard to any other thing, and, if sworn as a juror, he would do so. The court then asked the juror: "Suppose you had a trial, a case of your own here, and you would call 12 men into the jury box who felt toward you just exactly like you feel toward these men, would you be perfectly willing to try your case before those men?" The juror answered, "I would. Q. Perfectly willing? A. Yes, sir." The court saw the juror, heard his statements, and observed his manner of answering questions, and then in the exercise of his discretion overruled defendant's challenge for cause. In this ruling there was no abuse of discretion. The record further shows that the juror was excused by the exercise of one of defendant's peremptory challenges.

As we view the record, it contains no reversible error. The defendant had a fair trial, and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and SEDGWICK, JJ., not sitting.

HENRY J. BACKES, APPELLANT, V. L. C. COOK, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,996.

Sales: WARRANTY: WAIVER. Seed potatoes were sold and delivered under a warranty that they would grow. When the sacks were opened they appeared soft, and the purchaser, though in much doubt as to their fitness for seed, relied upon the warranty, planted, and cultivated them. *Held*, That he did not thereby waive the warranty, and is not precluded from defending an action brought upon the note given for the purchase price, on the ground that there had been a total failure of consideration.

APPEAL from the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Allen & Dowling and *Needham & Doten*, for appellant.

H. C. Vail, contra.

LETTON, J.

This is an action by the payee against the maker of a promissory note for $235. The defense is that the note was given for the purchase price of 100 bushels of seed potatoes, which were warranted to be true to name, of good quality, and valuable for seed; that they were not true to name, but were of mixed varieties and unfit for seed; that they were properly planted and yielded only about 20 bushels to the acre; that good seed potatoes under like circumstances would have yielded about 100 bushels to the acre, all to defendant's damage in the sum of $595: Verdict that plaintiff had no cause of action, and judgment of dismissal. Plaintiff appeals.

The first error assigned is that the court erred in permitting defendant and his witnesses to testify to the condition of potatoes sold to other purchasers and delivered at the same time. In one or two instances objections were made to certain questions along this line, but witness after witness was allowed to testify without objection as to the condition of the potatoes he had bought and received from plaintiff at the time those of defendant were delivered. In view of the fact that no objection was made to the great mass of like testimony, the ruling of the court could not be prejudicial.

It is also assigned that the court erred in admitting evidence of an express warranty because there was no consideration therefor. It is clear that there was an implied warranty, but it is also clear that the potatoes were sold upon an express warranty; Backes himself testifying that he guaranteed the potatoes to be sound and to grow. The purchase price was the consideration for the warranty.

According to defendant's testimony, when he received the potatoes he was in some doubt as to their being fit to plant. Plaintiff insisted that he take them and said that he would guarantee them to grow. When the sacks were opened in order to cut them for planting, defendant discovered that some of the potatoes were rotten and that a large quantity of the others were soft and seemed to be unsuit-

able for seed. He planted about 12 or 14 acres of potatoes altogether, about 7 or 8 acres with the 100 bushels he purchased from plaintiff, and the remainder with seed of another variety which he had grown himself. From the seed purchased the stand of potatoes was very poor, and he raised about 140 bushels, or about 20 bushels to the acre, while the remainder of the field planted with his own seed yielded about 90 bushels to the acre. It is clear that defendant believed that some of the potatoes would not grow, but he was not fully convinced that the remainder of them were unfit for seed, and the positive warranty given him by the plaintiff in all probability turned the scale in his mind and led him to spend the time and labor necessary to plant and cultivate the crop.

Plaintiff requested an instruction to the effect that, if the jury found from the evidence that the potatoes furnished were of poor quality and unfit for planting, and this fact was known to defendant when he planted them, and that he did so without notifying plaintiff of such defects, he thereby waived any breach of warranty. This was refused. The following instruction was given without objection or exception by plaintiff: "The defendant claims that this note was given for 100 bushels of seed potatoes, and that said potatoes were worthless, and for that reason he ought not to pay the note sued on. And, if you believe from a preponderance of the evidence that such is the case, you will find for the defendant. If, on the other hand, you believe from the evidence that the potatoes were good seed potatoes, containing germinating vigor, vitality, and strength, and that the defendant's failure to raise a crop therefrom was due to some other cause or causes than lack of vigor, vitality, and strength in the seed, your verdict should be for the plaintiff." Instruction No. 6, to which plaintiff excepted, is substantially the same. Plaintiff insists that the proper rule is that, if a purchaser accepts goods with knowledge of their defective condition and consumes them by use, he thereby waives any warranty of quality, citing *Hazen v. Wilhelmie*, 68 Neb. 79, and cases following it; and it is said that *Dunn v. Bushnell*, 63 Neb.

568, was overruled by the former case. This does not follow. In the *Hazen* case the question of recovery upon a breach of warranty was not involved, and it is apparent that the purchaser accepted the trees and planted them knowing definitely at the time that they were not in accordance with his contract of purchase. The principle was the same as if it had been an ordinary contract of sale of merchandise and not a sale and delivery of seeds, plants or trees warranted to grow. The cases are distinguishable. In *Dunn v. Bushnell, supra,* one question only was really involved, and the decision in that case is not overruled. In *Grisinger v. Hubbard,* 21 Idaho, 469, it is said: "Where fruit trees are received under an implied warranty as to their condition and likelihood to grow, and the purchaser cannot definitely determine whether they are in such condition at the time of delivery, the purchaser has the right to receive them and ascertain whether they are in a good or bad condition or will grow if given proper care, and by so receiving such trees the purchaser is not precluded from recovering upon such warranty." See, also, note to that case in Ann. Cas. 1913E, p. 87. There is an interesting note to the case of *Leonard Seed Co. v. Crary Canning Co.,* 147 Wis. 166, in 37 L. R. A. n. s. 79, upon the liability of a vender of seeds. *Frith & Co. v. Hollan,* 133 Ala. 583, 91 Am. St. Rep. 54. A reference to these cases and notes shows that the doctrine of *Dunn v. Bushnell, supra,* is supported by authority. Defendant might have refused to receive the potatoes, but he also had the right to retain and plant them, and, if they proved to be worthless, to assert that fact as a defense against an action for the purchase price.

Plaintiff claims that whatever may be held to be the rule of damages there was not an entire failure of consideration and there should have been a verdict in his favor pro tanto; but it seems to us that the fact that, after preparing the ground, planting, cultivating and harvesting the crop from 7 or 8 acres, the plaintiff only received 40 bushels of potatoes more than the seed planted evidences an entire failure of consideration. No man with any common

sense or judgment would prepare, plant and cultivate that amount of ground for such a meager return.

We find no prejudicial error in the record.

AFFIRMED.

MORRISSEY, C. J., not sitting.

HERMAN ZIGMAN, ADMINISTRATOR, APPELLEE, V. BEEBE & RUNYAN FURNITURE COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 17,999.

1. **Negligence: ACTION FOR DEATH.** The act of coupling two wagons together and thus driving them on the street does not of itself constitute negligence on the part of the owner of the wagons, so as to render him liable in damages for the death of a child who climbed on the connecting pole.
2. ———. The doctrine of the "Turntable cases" is not applicable to the facts in this case.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

McGilton, Gaines & Smith, for appellant.

Baldrige, Keller & Keller and *Charles E. Foster, contra.*

LETTON, J.

Action for the wrongful killing of plaintiff's intestate; verdict and judgment for $3,000, defendant appeals.

The facts that seem to be established by the evidence are substantially as follows: The defendant is a wholesale dealer in furniture. On the afternoon of October 19, 1909, a driver in its employ was driving at a walk along Twentieth street in Omaha with two covered furniture wagons, connected together, on his way to the railroad station. The first wagon, to which three horses were attached, was heavily loaded with outgoing furniture, the other was

empty and was to be loaded with incoming furniture. Both wagons were of the same size and character. The pole or tongue of the rear wagon was tied to the axle of the front one. An eyewitness testifies that as the wagons came past his drug store, near which he was standing, Philip Zigman, the deceased, a little boy between four and five years old, with another little boy of about the same age, were lying across the pole of the second wagon, with their backs toward him and their faces down. The driver was seated in front of the first wagon, with his view to the rear obstructed by the load of furniture. The witness stood about five feet from the wagons as they passed. Within a minute afterwards he was told by two school boys that the deceased, who was then sitting upon the curbing about 60 or 65 feet away, had been run over. The boy had been run over across the body and he died in a very few minutes. The street is usually busy at that point with heavy traffic, street cars pass every 10 minutes, but few automobiles use it. The Zigman home is a block west from where the accident happened.

The driver testified that the tongue was about 2½ feet from the ground; that there were about 8 feet between the box part of the front wagon and that of the rear one; that there was no one on the rear wagon; that this was the customary way of hauling the empty wagons; that he did not see any boys as he passed the drug store; and that he knew nothing about the accident until he was called back to the spot where it happened. The mother testified that the boy went to the drug store to buy some candy, and that it was only five minutes from the time he left the house until he was brought back dead.

At the conclusion of the evidence for plaintiff, defendant moved the court to direct a verdict in its favor, for the reasons that it is not shown that defendant was guilty of any negligence in using the streets or in the manner of using the wagons, and that the injury to the child was due to the carelessness of the parent and plaintiff. The motion was overruled, and the questions as to the negligence of the defendant in connecting the wagons, and in using them on

the street as connected, were submitted to the jury under instructions based upon the doctrine of the "Turntable cases."

Defendant makes the same contention here as in the district court. The crucial question is whether the coupling of the wagons together in the manner described and driving the team on the street without a guard or outlook on or about the rear wagon in order to warn children who might attempt to climb thereon can be said, as a matter of law, not to constitute negligence. The jury has found that the act was negligence. Unless, when legal principles are applied to the facts presented, the defendant must be held to have been acting within its legal rights and was without fault, the verdict must stand, because otherwise the question was for the jury. The plaintiff relies upon the doctrine of *Lynch v. Nurdin,* 1 Adolph. & E. (Eng.) 29, that one who negligently leaves dangerous machinery or appliances of such a nature as to be attractive to children, within their reach, unguarded, or in such a situation that it may be easily put in motion by children, may, if injury to a child results, be guilty of actionable negligence. This is the rule of the "Turntable cases," and is the law in this state. *Sioux City & P. R. Co. v. Stout,* 17 Wall. (U. S.) 657; *Chicago, B. & Q. R. Co. v. Krayenbuhl,* 65 Neb. 889. Can this principle be applied to the passage of vehicles along the streets of a city? In the diversity of vehicles which traverse the streets there may be many forms attractive to children, and in many instances the attractive part of the vehicle is not within the view of the driver. Omnibuses are often used which are entered by steps at the rear, with no conductor or guard, and the door to which is held closed by a cord or strap, reaching to the driver's seat. Would a child who climbed upon the rear steps while the omnibus was passing along the streets of a city be entitled to recover for injuries sustained by falling off the steps? *Hebard v. Mabie,* 98 Ill. App. 543, holds to the contrary, even in a case where the driver knew the child was there. It is not uncommon to see automobiles with trunk platforms or tire holders projecting from the

rear, upon which a child might easily climb and be beyond the view of the driver. Could negligence be imputed to the owner of the machine if an accident occurred by reason of a child having seated himself upon the rear projection without the driver's knowledge? Wagons of certain types are constructed so that children can easily climb upon them. Those used for hauling stone, or to remove growing trees, or to carry iron girders, are of this class. Is it incumbent upon the owner of such a vehicle to send a guard as well as a driver every time he uses the streets for the transportation of his goods? These inquiries are suggested by the facts in this case. If the nature of a vehicle used on the streets is such as to be attractive to children, and they may easily climb thereon, then, if the principle contended for by the plaintiff is sound, no owner of such a vehicle can relieve himself from liability for negligence unless it is accompanied by a special guard, for the attention of the driver in a busy street must necessarily be directed to the front in order to control his team or his automobile. The question would be different if the driver was aware that children were congregating on and about it, and were liable to be injured if not warned away, and this is the principle upon which some cases have been decided. The following cases establish the principle that, under the circumstances of this case, no negligence has been shown. *Bishop v. Union R. Co.*, 14 R. I. 314; *Hestonville Passenger R. Co. v. Connell*, 88 Pa. St. 520; *Rice v. Buffalo Steel-House Co.*, 45 N. Y. Supp. 277; *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688; *Emerson v. Peteler*, 35 Minn. 481. In the California case of *Skinner v. Knickrehm*, 10 Cal. App. 596, upon which the plaintiff places much stress, the facts were that a house with a wagon attached at the rear was being slowly moved along the streets of Los Angeles. The driver was unable to see the wagon from his position in front of the house, and none of the other employees were in a position that they could see the wagon. "These children were permitted to, or at least were not by any one forbidden to, play upon the wagon, and did so for a long space of time while the house was being moved for a

large portion of a block." Under these circumstances the court held it was for the jury to determine whether the defendant was guilty of negligence. This case is not applicable here, because in the present case the driver was unaware of the presence of the child. If the proof had shown his knowledge, a different question would be presented. The other cases relied upon by plaintiff, where dangerous machines, such as iron rollers, wheel scrapers, or the like, were left unguarded upon, or where lumber or building material was piled in a dangerous condition close by, a public street, come within the doctrine of *Lynch v. Nurdin, supra,* and the "Turntable cases," and are likewise inapplicable.

The judgment of the district court is

REVERSED.

MORRISSEY, C. J., ROSE and SEDGWICK, JJ., not sitting.

JAMES R. WEDDLE, APPELLEE, V. GEORGE C. SPECHT, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,003.

1. **Homestead:** DESCENT. Upon the death of either a husband or a wife holding the fee to the family homestead, the homestead vests in the surviving spouse for life. Their minor children, merely by virtue of such relation, have no homestead interest therein.
2. **Judgment:** CONCLUSIVENESS: PARTITION: INFANTS. Where, in a partition suit in a court of competent jurisdiction, service is properly had upon minor heirs, and a guardian *ad litem* is appointed and answers for them, the final judgment in the case binds the minor heirs as fully as other owners of the real estate, and the judgment may not be collaterally attacked. *Kazebeer v. Nunemaker*, 82 Neb. 732.
3. *Shearon v. Goff*, 95 Neb. 417, examined, and statement set forth in this opinion explained.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Heasty & Barnes, for appellant.

C. H. Denney, contra.

LETTON, J.

Action by the vendor to enforce specific performance of a contract to purchase real estate. The defense is that the title is not perfect in the vendor, as it was agreed it should be. Decree for plaintiff.

Hattie Weddle died intestate, owning 160 acres of land which was occupied by her and her husband, James Weddle, and their two minor children as the family homestead. She had two other children who were of full age. Afterwards her husband, James Weddle, brought an action in partition, making each of the heirs a party defendant. The petition set forth that he was the owner in fee of an undivided one-fourth interest in the land, and that each of the four heirs owned a three-sixteenth interest in it, subject to his right of homestead, which he alleged was of the value of $1,200; that there were no debts; that he had given the statutory bond to cover debts and expenses; and that the land was encumbered by a mortgage lien in the sum of $2,000. The adult heirs entered a voluntary appearance. Proper service was had upon the infant defendants, and a guardian *ad litem* appointed, who filed an answer. The court found the allegations of the petition to be true, confirmed the shares of the respective parties, and appointed a referee to make partition. The referee reported that the premises could not be divided without great prejudice to the owners, and he was thereupon ordered to sell the land. It was sold to James Weddle, who was the highest and best bidder. The sale was confirmed and the proceeds distributed in accordance with the decree. The share of the minor heirs was paid to and receipted for by their duly appointed and qualified guardian.

The defendant takes the position that the land was the homestead of deceased, and continued to be the homestead of James Weddle and his minor children after his wife's death, and that therefore the proceedings in partition were ineffective so far as concerns the estate of the minors, and that plaintiff is not possessed of a title in fee simple. He

states the question for determination, as follows: "If the district court has jurisdiction to decree a partition of the homestead while it is occupied by the surviving spouse and the minor children of the deceased as their home, then the judgment of the lower court should be affirmed. If, on the other hand, a homestead while thus occupied may not be partitioned, then the judgment of the lower court should be reversed."

The theory of defendant is that the court has no jurisdiction to partition a homestead while the parent and minor children are residing thereon as one family, for the reason that the infant defendants could not legally consent to a waiver of their homestead rights, nor could their guardian *ad litem* consent to such waiver for them. This assumes that in this state minor children have a homestead interest separate and apart from that of a surviving father or mother. Reliance is placed upon the following quotation from a note to *Battey v. Barker,* 62 Kan. 517, in 56 L. R. A. 33, 77: "The policy of the law with reference to homesteads is as a general rule to keep the family together after the death of its head, and to preserve the home to it for the joint use of all. Partition of the homestead estate, either between the children or between the widow and the children, is not, therefore, usually allowed, and in some instances it is expressly prohibited." But it is pointed out elsewhere in the note that the estate or interest which either the surviving parent or the minor children acquire in a homestead depends entirely upon the language of the statute, and that in many states minor children of the family are given by statute an interest in the hometsead. In this state the survivor upon the death of his or her spouse takes a life estate in the homestead. There is no statute separating the rights of minor children from those of the surviving parent, and if he or she should select another homestead, or move the family residence to another point, there is nothing to prevent it from being done. The life estate does not depend upon residence. *Durland v. Seiler,* 27 Neb. 33; *Cooley v. Jansen,* 54 Neb. 33; *McFarland v. Flack,* 87 Neb. 452. In the opinion in *Shearon v. Goff,* 95

Neb. 417, all preceding cases upon this point are collected and reviewed. But defendant also relies upon the following statement in the latter case, speaking of the rights of a surviving husband where the deceased wife had been the owner of the fee: "On the other hand, he could not have compelled the owner of the remainder estate to submit to a sale by partition or otherwise. A remainderman may say to the owner of the life estate: 'You have a right to sell your life estate. Over that I have no control. But you cannot sell the entire estate. That is to say, you cannot sell my interest as a remainderman, even though you turn over to me a portion of the proceeds arising from such sale. I prefer to wait until your death and then take the entire estate.'" This point was not involved in the determination of the case. The language is obiter dictum as applied to the owner of an interest in fee and seems to be in contravention of the statute.

The determination of this case might be placed upon another ground. The proceedings in partition were apparently entirely regular, and under the provisions of sections 1497, 1499, 8212, 8213, 8322, 8323, Rev. St. 1913, the minor heirs are bound by the finding and judgment of the court as fully as the other owners of the property. 30 Cyc. 223; *Sites v. Eldredge,* 45 N. J. Eq. 632, 14 Am. St. Rep. 769.

This action is of the nature of a collateral attack upon a judgment rendered by a court of competent jurisdiction over the person and the subject matter, and hence it cannot be maintained. The cases of *Staats v. Wilson,* 76 Neb. 204, and *Kazebeer v. Nunemaker,* 82 Neb. 732, are decisive of the question. *Morrill v. Morrill,* 20 Or. 96, 23 Am. St. Rep. 95, and note.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

FOURTH NATIONAL BANK, APPELLANT, V. ADAM RUTHERFORD ET AL., APPELLEES.

FILED FEBRUARY 12, 1915. No. 18,006.

Appeal: CONFLICTING EVIDENCE. A judgment based upon the verdict of a jury, rendered upon conflicting evidence, will not be set aside unless it is manifestly wrong.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John M. Ragan, James E. Eddie and *E. E. Danly,* for appellant.

J. W. James and *Karl D. Beghtol, contra.*

LETTON, J.

Action by the indorsee of a promissory note. The defense is that the note was delivered to the plaintiff bank to hold in escrow, together with two deeds, a note and mortgage, and other papers, during negotiations between defendant Adam Rutherford and the payee, James B. Blazer, for the purchase of certain lands; that the negotiations fell through, and the sale was never consummated; that the bank fraudulently and without authority from Rutherford delivered the note to Blazer; and that afterwards Blazer indorsed the note to the bank, which took it with full knowledge of these facts and was not a *bona fide* holder for value. Verdict and judgment for defendants. Plaintiff appeals.

The vital question presented is whether the note was ever delivered to Blazer by Rutherford, or whether it was placed in escrow and delivered to him without authority by the plaintiff, for, of course, if this course was pursued, the bank could not be a purchaser and holder in due course of business.

The evidence shows that Blazer and Rutherford on May 27, 1910, went to the office of an attorney at Wichita, named

Hatfield, to procure the contract drawn. Hatfield drew the contract, two deeds and a mortgage. By the terms of the contract Blazer agreed to sell to Rutherford certain lands in Kansas, and Rutherford, in payment agreed to convey to Blazer certain lands in New Mexico, assume a mortgage of $5,600 on the Kansas land, give Blazer a note for $4,400 secured by a second mortgage on the same land, and pay him $500 in money and $500 in a negotiable promissory note, due and payable January 1, 1911. (The latter is the note in controversy.) The contract further provided that the deeds, mortgage, contract and notes should be deposited in the Fourth National Bank of Wichita, with instructions that, when Blazer was satisfied with the equipment and working of a well and pump to be placed on the New Mexico farm by Rutherford, the deeds, notes and mortgage should be delivered to the respective parties, but that, if Blazer was not satisfied, the bank was to deliver back the deeds, mortgage and notes to the parties making the same, and the agreement was to be discharged. When Blazer and Rutherford left the office of Mr. Hatfield, Blazer had an envelope containing the deeds, mortgage and contract in his pocket. When they arrived at the bank they drew up the $4,400 note, the $500 note, a draft for $500, and a check for $12.50. So far there seems to be no dispute in the evidence.

Rutherford testifies that when they went to the bank they met its president, L. D. Naftzger, and explained that they were making an exchange of land and wanted to leave some papers in the bank; but they also had a conversation with the younger Naftzger, who was assistant cashier; that after signing the notes Rutherford gave them to Blazer; that Blazer put the notes in the envelope with the other papers, gave them to Mr. Naftzger, and told him they were to be placed in escrow. "Q. Where did you go after you had signed that? What did you do then, and what did he do? A. We turned around to Mr. Naftzger's desk. Q. What did he do with the notes? A. He took them out of the envelope and looked at them. Q. Who did? A. Mr. Naftzger." He also said that by agreement Blazer directed

Naftzger to send the $500 note to Hastings to have Mr. Rutherford's brother sign, and this was done. The contract recited: "The deeds and mortgage and *notes specified herein* shall be deposited," etc.; that, if Blazer is satisfied with the well, "the said deeds and *notes* shall be delivered," and that, if he is not satisfied, then "the bank is hereby instructed to deliver back the said deeds and mortgage and *notes* to the respective parties." Rutherford denies an absolute delivery to Blazer, but one for the purpose only of procuring his brother's signature and replacing the note in escrow.

For plaintiff Blazer testified that the note was delivered at the time it was executed; that it was never placed in the envelope and left in escrow, but that, after the deeds and mortgage were placed in the envelope and delivered, Rutherford signed the note, and they together asked Mr. Branch, the cashier of the bank, to send this note to Hastings; that afterwards he went to the bank and Branch handed him the note properly signed; that he indorsed and sold the note to the bank in August, 1910; that in the agreement the note was considered as cash and was not to be placed with the other papers in escrow.

Mr. Branch testified that he did not look at the papers in the envelope when they were handed to him; that there were no instructions on the envelope; and that he sent the papers to Hastings, as directed by Blazer; and that he never knew the $500 note had anything to do with the land transaction, but bought it at the suggestion of the president of the bank. Mr. Naftzger testified that, at the time of his conversation with Blazer relative to the purchase of the note, he did not know Rutherford, and purchased the note purely upon the faith of Blazer and what Blazer said about Rutherford.

Hatfield testified that he was acting as attorney for Blazer when he drew the papers; that the word "notes" appearing in the contract was an error of the stenographer and should have been the word "note." The envelope in which the papers were placed was produced. It bore the words "Blazer-Rutherford papers" in blue pencil in the

handwriting of Hatfield, also the words "2 warranty deeds, one mortgage and note $4,400, one contract," written in ink, also in Hatfield's handwriting. There is a conflict in the evidence as to whether the latter words were upon the envelope at the time it was delivered to the bank.

There is a direct conflict in the evidence. The fact that the contract mentions "notes" as being among the papers to be held in escrow corroborates Rutherford, but Hatfield testified that this was a clerical error. The language of the contract is somewhat ambiguous. Rutherford agrees "to pay said Blazer $500 cash in hand, earnest money, the receipt of which is hereby acknowledged by said Blazer, to execute his said promissory note to said Blazer for the sum of five hundred ($500) dollars as earnest money, due on or before January 1, 1911," but the receipt of the note is not acknowledged, as it well might be if the other note only was to be placed in escrow.

The plaintiff contends that the evidence does not sustain the verdict, and that the court erred in refusing to direct a verdict for plaintiff. We are unable to view the evidence in this light. If, as Rutherford testified, the note was not delivered to Blazer, and was placed in the bank to be held in escrow, and was afterwards delivered to Blazer by the bank in violation of the escrow agreement, Blazer acquired no title, and the bank was not an innocent purchaser and a holder in due course. We are inclined to the view that the greater weight of testimony is with the plaintiff; but it must be said that, if the jury believed Rutherford's testimony, and disbelieved that of Hatfield and Blazer, it is sufficient to support the verdict.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

AMERICAN EXPRESS COMPANY, APPELLEE, V. POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,012.

1. **Telegraphs and Telephones:** NEGLIGENCE: LIABILITY. A telegraph company is liable for all damages sustained by reason of its failure to correctly transmit and deliver a message received by it, notwithstanding an agreement printed on its blanks to the contrary. Rev. St. 1913, sec. 7406.
2. ———: TORTS: DAMAGES. The sender of a message, who has been damaged by the failure of a telegraph company to deliver it as written, may waive the contract and sue as in tort, and in such case he is entitled to compensation for all damages which are directly caused by or flow from the negligent omission, regardless of whether they might have been contemplated as a probable result of a breach of the duty. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167.
3. ———: NEGLIGENCE: LIABILITY. A telegraph company, which accepts a message to be delivered, beyond its own lines and delivers the same incorrectly, is liable for the mistake, although made by an employee of another corporation over whose lines the sending company transmitted the message.
4. ———: ———: DEFENSES. As against one who employs an express company to transmit money by wire, the fact that by a rule of the express company its agents are required to send messages directing the payment of money in code words, does not constitute the express company a joint tort-feasor with a telegraph company which failed to correctly deliver the message (which designated the amount of money to be paid in plain words) and constitutes no defense in an action for damages, for such failure, by the express company against the telegraph company.
5. ———: ———: DAMAGES: DIRECTION OF VERDICT. Where the amount of damages sustained by reason of the failure to deliver a message correctly is proved by undisputed evidence and is liquidated, it is not error for the district court to apply principles of law to the undisputed facts and direct a verdict for plaintiff.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

F. H. Gaines, B. H. Dunham and *Herman Aye, contra.*

LETTON, J.

In 1905, Watson, Woods Brothers & Kelly Company, who were engaged in importing and selling horses for breeding purposes at Lincoln, Nebraska, employed the American Express Company to transmit by telegraph to Joseph Watson, Queen's Hotel, Antwerp, Belgium, 80,000 francs. In order to accomplish this, the agent of the express company delivered to the agent of the defendant at Lincoln the following message, addressed to the American Express Company at 65 Broadway, New York: "Button Pike. Eighty thousand francs. Joseph Watson, Queen's Hotel, Antwerp, Belgium." The words "Button Pike" were code words used to identify the sender of the message as the agent of the express company, and also constituted an order to transmit the sum named. The telegram reached Chicago, and was there received in proper form by an automatic receiving and recording instrument known as a "Morsograph." In transmitting the message from Chicago, the letter "y" in the word "eighty" was omitted, and, as received by the express company in New York, it was a direction to pay eight thousand francs. The express company promptly cabled its agent at Antwerp to pay 8,000 francs to Mr. Watson. This message was delivered to him about 9 o'clock in the evening of November 2. Watson had been purchasing horses in Belgium and France, which were to be delivered to him at Antwerp on November 3, to be loaded upon the steamer "British Princess," which was scheduled to leave Antwerp on November 4. As soon as Watson received the message he notified the express company's agent that there was an error, and immediately cabled to his company at Lincoln to the same effect. A correction was made, and the remainder of the 80,000 francs was ordered paid to him. The message was received on November 5, after the steamer had sailed. As soon as Watson found that he could not get the money in time to pay for the 35 horses he had purchased, he, through his interpreters, notified the persons from whom he bought to

delay delivery. Previous to this, Watson, Woods Brothers & Kelly Company had incurred large expenses in advertising a public auction of these 35 horses and 19 other horses to be made at Lincoln, Nebraska, on December 5, and had incurred large expenses in preparing for the sale. Neither Watson nor his associates in this country were able to procure other transportation so that the horses might be delivered before the day of sale, although they used due diligence in that behalf. The horses were finally shipped by a later steamer. Watson, Woods Brothers & Kelly Company, afterwards began an action against the American Express Company to recover damages for the failure to transmit the money to Watson. Issues were made up, and as the case was about to come to trial the express company was informed by its counsel that, from his knowledge of the facts constituting the plaintiff's case, if the case went to a jury, a verdict for a large sum would probably be rendered against them, and that a proposition to compromise for the sum of $3,000 had been made. He advised its acceptance. This was done, and a judgment for $3,025 was rendered against the express company in the United States circuit court for Nebraska. The Postal Telegraph-Cable Company was fully notified by the express company of the nature of that action, warned to defend, and was advised of the offer to compromise, but at all times denied any liability. This action is brought to recover the amount of the judgment paid by the express company, together with the costs and expenses of defending that suit.

The defense is: (1) That the message was sent as an unrepeated message, under a condition in the contract which provided that the telegraph company should not be liable for mistakes in any such messages beyond the amount received for transmission; (2) that the error was made by an operator in the employment of the Postal Telegraph-Cable Company of Illinois, a different corporation from this defendant, and that there was a condition on the telegraph form which provided that the company should not be liable for mistakes made beyond its own lines; (3) that a rule of the express company required its agents to send

messages of this nature in code words; (4) that the message did not indicate, and the company was ignorant of, its purpose, and such liability and loss as is claimed here was not within the contemplation of the parties; (5) that it accepted the message with the belief that the express company had, in accordance with one of its rules, procured an agreement from the sender of the money that it should not be liable for errors made by telegraph companies in sending messages of this nature.

At the conclusion of the testimony the district court directed the jury to return a verdict for plaintiff for the amount claimed. Defendant appeals.

The brief of appellant presents three points which are relied upon as requiring a reversal of the judgment. It is claimed that there was no legal proof of damages of which the mistake was the proximate cause; that, if it be so held, the amount was a question for the jury; and that the damages claimed are so remote and speculative that they could not be forseen or anticipated. It is argued that it is not shown that Watson had any legal contract with the sellers to deliver the horses in Antwerp on November 3. In the absence of evidence to the contrary, Mr. Watson's testimony sufficed to show that he had bought the horses, and that they would have been delivered in Antwerp if he had not stopped delivery as soon as he ascertained that the money would not be received in time to pay for them on that date. The testimony as to other damages incurred was undisputed and would have sustained a much larger judgment. It is immaterial that the telegraph company was not aware of the purpose of the message other than that it directed the payment of money. By section 7406, Rev. St. 1913, a telegraph company is declared to be liable for the nondelivery of, and for all mistakes in transmitting, messages made by any person in its employ, and "any such telegraph company shall not be exempted from any such liability by reason of any clause, condition or agreement contained in its printed blanks." This statute is considered and applied in *Kemp v. Western Union Telegraph Co.*, 28 Neb. 661, *Western Union Telegraph Co. v. Low-*

rey, 32 Neb. 732, *Pacific Telegraph Co. v. Underwood,* 37 Neb. 315, *Western Union Telegraph Co. v. Kemp,* 44 Neb. 194, and *Western Union Telegraph Co. v. Beals,* 56 Neb. 415, and it is held that a telegraph company, by virtue of the statute, is liable for all damages sustained by its failure to correctly transmit and deliver a message received by it, notwithstanding anything contained on its printed blanks. In a like action, under a somewhat similar statute in Wisconsin, in *Fisher v. Western Union Telegraph Co.,* 119 Wis. 146, it was held that the familiar doctrine of *Hadley v. Baxendale,* 9 Exch. (Eng.) 341, which ordinarily controls the measure of damages in actions for breach of contract, does not apply. See, also, *Barker v. Western Union Telegraph Co.,* 134 Wis. 147. *Smith v. Western Union Telegraph Co.,* 80 Neb. 395, and *Marriott v. Western Union Telegraph Co.,* 84 Neb. 443, were apparently actions for breach of contract, and the rule in *Hadley v. Baxendale, supra,* seems to have been applied. Here, however, the petition bases the right to recover, not upon the contract, but upon negligence and want of care on the part of the telegraph company, and the rule as to the measure of damages in actions for breach of contract does not apply. The case falls within the rule applied to other common carriers, with respect to the right of a plaintiff who waives the contract and sues in tort and the plaintiff is entitled to compensation for all injuries which are directly caused by or flow from the wrongful act or acts, regardless of whether they might have been contemplated as a probable result of a breach of the duty. *Chicago, B. & Q. R. Co. v. Spirk,* 51 Neb. 167.

It is asserted that the telegraph company is not liable for the mistake of an employee of the Postal Telegraph-Cable Company of Illinois, which company had assumed the obligation to deliver the telegram at New York city. At the time of the trial, defendant stipulated that the telegram in question "was delivered by the defendant to the plaintiff at its office in New York city on November 1, 1905." Since the company accepted and actually delivered

it, all subordinate agencies and persons employed in the transmission were directly or indirectly in its service and acting in its behalf. It assumed the burden of delivery, and delivered the message in a mutilated form. Moreover, under the statute referred to, the condition printed upon the back of the message whereby it attempted to limit its liability to its own line is inoperative.

It is next argued that the negligence of the express company concurred with that of the Postal Telegraph-Cable Company of Illinois, and there can be no contribution between joint tort-feasors. It is said that the express company is a tort-feasor because it was negligent in failing to use code words in sending the message. There was no duty to send code words, and no neglect in failing to do so. The express company could waive its own regulation, and it is shown that it often did so. The telegraph company received the message with the amount of money to be paid stated in plain words. It is too late after damages result to say that it should not have been written or accepted unless in code. Besides, among the printed conditions upon which the telegraph company bases its defense is one that it shall not be liable "for errors in ciphers or obscure messages." This of itself justifies the use of plain words, if any justification is needed. That the words of a telegram are too plain and easily understood is a novel complaint. It is usually codes and ciphers that do not find favor with telegraph companies.

The damages sustained by the importing company were abundantly proved and seem to have exceeded the sum agreed upon. The amount of the judgment, attorneys fees, and expenses incurred by the express company in defending the suit were not disputed. The amounts being liquidated, the district court had the right to apply the principles of law and to direct the jury accordingly. Its judgment is therefore

AFFIRMED.

MORRISSEY, C. J., ROSE and SEDGWICK, JJ., not sitting.

JOHN FRISH, APPELLEE, V. SWIFT & COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 17,991.

1. **Negligence:** ACTS DONE IN EMERGENCY. On the issue of contributory negligence in an action to recover damages for personal injuries, where plaintiff was placed in a position of sudden peril without any fault on his part, the test of his conduct is that of a person of ordinary prudence confronted with the same circumstances, and this rule applies to cases in which the emergencies arise from accidents or from acts of third persons or from negligence of the defendant.
2. ———: QUESTIONS FOR JURY: CONFLICTING EVIDENCE. In actions to recover damages for personal injuries, issues of negligence and contributory negligence are questions for the jury, where the evidence is conflicting.
3. **Master and Servant:** ASSUMPTION OF RISK. An employee does not assume the risk of actionable negligence on the part of his employer.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Smyth, Smith & Schall, contra.

ROSE, J.

Plaintiff brought this suit to recover from his employer damages in the sum of $3,000 for personal injuries. From judgment on a verdict in favor of plaintiff for $2,000, defendant has appealed.

At the time of the injury plaintiff and about 50 other employees were working in the sheep department of defendant's packing house in South Omaha. Sheep were handled at the rate of 200 an hour. When killed they were suspended from an overhead, moving, endless chain, running on small pulleys supported by a stationary iron rail swung from the ceiling. The slaughtered animals moved with the chain past plaintiff, who, in common with other butchers,

had a distinct service to perform in the dressing of each animal. The cattle department was in operation at the same time in a different part of the same room. A steer, infuriated by a blow intended to be, but not proving, fatal, ran into the sheep department. An alarm was given. The chain was stopped. The employees, without exception, hastened to places of safety. One jumped behind a post. Another crawled into a pit. Plaintiff climbed onto a three-inch railing, threw his left arm on the overhead rail already described, and clung to the chain with his left hand. Before the steer had been killed and before the employees had returned to their places, the chain was started, drawing plaintiff's hand into the pulleys. This action was brought to recover resulting damages. The starting of the chain without notice or warning under the existing conditions is the negligence imputed to defendant. The latter denied negligence, and pleaded contributory negligence and assumption of risk.

Error in refusing to direct a verdict for defendant is one of the assignments. Under this head it is argued that plaintiff was guilty of contributory negligence as a matter of law, and that there is no evidence of actionable negligence on part of defendant. It is asserted that when plaintiff climbed onto the railing he knew the chain was dangerous; that it was unnecessary to put his hand on it; that he knew it was almost constantly in motion during working hours; that his act amounted to negligence; that he should have put his arm around the track in which the chain ran or grasped some other safe and convenient part of the structure. The truth of these assertions would not necessarily defeat the action on the ground of contributory negligence. It is undisputed that plaintiff was required to act instantly in the face of imminent peril. An infuriated steer, a few feet away, was charging toward him. No place had been provided for his safety. He had no time for deliberation. The machinery was motionless. The chain had been stopped. It was dangerous only when in motion. The butchers were not in their places to perform their work on moving carcasses suspended from the chain. Following

the instinct of self-preservation, plaintiff's attention was directed to the movements of the dangerous animal. The situation was not created by plaintiff's negligence. In the analysis of his conduct under such conditions, the law did not require mature deliberation in front of the approaching, infuriated steer or the wisest selection of the place to put his hand, while balancing on a three-inch railing. The test of contributory negligence in a situation like this is not to ascertain where a person of ordinary prudence would have deliberately put his hand in the absence of danger, but what he would be likely to do under the same circumstances in the presence of the existing peril. It is clear that plaintiff was not guilty of contributory negligence as a matter of law. The issue was one of fact for the jury.

The law has been correctly stated as follows: "When a person without his fault is placed in a situation of danger, he is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present; nor can it be said that, as matter of law, he is guilty of contributory negligence because he fails to make the most judicious choice between hazards presented, or would have escaped injury if he had chosen differently. The question in such case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do, in the presence of such existing peril, and is one of fact for the jury." *Pennsylvania R. Co. v. Snyder,* 55 Ohio St. 342.

The rule is not confined to cases where the peril was created by defendant's negligence, but is applicable to situations arising from accidents or from acts of third persons. *Chattanooga E. R. Co. v. Cooper,* 109 Tenn. 308; *Cassida v. Oregon R. & N. Co.,* 14 Or. 551; *Alabama & V. R. Co. v. Lowe,* 73 Miss. 203; *Palmer v. Larchmont Horse R. Co.,* 98 N. Y. Supp. 567; *Wheeler v. Oregon R. & N. Co.,* 16 Idaho, 375; *Hoff v. Los Angeles Pacific Co.,* 158 Cal. 596; *Cannon v. Pittsburg & Birmingham Traction Co.,* 194

Pa. St. 159; *Lemay v. Springfield Street R. Co.*, 210 Mass. 63, 37 L. R. A. n. s. 43, note, p. 57.

Was actionable negligence proved? Defendant's foreman controlled the power used in operating the chain. He stopped the chain when the warning of danger was given. The jury settled the fact that the foreman started the chain without warning. There is evidence tending to show that plaintiff at the time was in plain view of the foreman, who was perhaps not over 20 feet away. Plaintiff's unusual position, with his arm on the overhead railing, and his left hand necessarily near the chain or on it, would naturally attract attention. Though the foreman denied that he saw plaintiff in the situation described, the denial is not conclusive. *Zitnik v. Union P. R. Co.*, 91 Neb. 679. It may be inferred from circumstances of which there is proof that the foreman knew, or by the exercise of ordinary care should have known, of plaintiff's peril. Plaintiff was not a trespasser. Defendant owed him the duty of exercising ordinary care to prevent injury. Under the circumstances the issue of negligence was one of fact for the jury.

Plaintiff did not assume the risk of actionable negligence.

The instructions are in harmony with the views expressed.

The record does not affirmatively show that the verdict is excessive.

AFFIRMED.

MORRISSEY, C. J., not sitting.

HAROLD BLACKMAN, APPELLEE, V. WESTERN ELECTRIC COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 12, 1915. No. 17,992.

Master and Servant: INJURY TO SERVANT: ACTIONABLE NEGLIGENCE. Where an employee voluntarily goes outside of the scope of his employment without the permission or the knowledge of his employer, and operates a rip-saw by which he is injured, the employer

is not chargeable with actionable negligence for failing to give warnings of danger or instructions to prevent injury.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

John W. Parish, for appellants.

Sullivan & Rait, James O'Hara and *Edward Simon, contra.*

ROSE, J.

This is an action by plaintiff against his employer, the Western Electric Company, and its foreman, to recover damages in the sum of $10,000 for personal injuries. From a judgment in favor of plaintiff for $3,000, defendants have appealed.

When plaintiff was injured, he was 16 years and five months old. His regular work was taking apart and cleaning telephones and polishing nickel. Being anxious to make a partition in a drawer in which he and fellow employees kept their tools, he went to a rip-saw in his employer's workshop, January 2, 1911, with a four-foot board four inches wide, and ripped it through the center. In doing so, the saw severed from his left hand the index finger and the thumb. The negligence imputed to defendants consists in their failure to warn plaintiff of the dangerous character of the saw and to instruct him in its operation and use. They denied negligence, and pleaded that plaintiff voluntarily went outside of the scope of his employment without his employer's permission or knowledge and injured himself through his own negligence.

The sufficiency of the evidence to sustain the verdict is the determining question presented. There is nothing to indicate that plaintiff was handicapped by any mental or physical infirmity. When injured, he was not acting within the scope of his employment. He was neither directed by defendants to make a partition in the tool drawer nor to use the rip-saw for that purpose. To sustain the verdict, he relies on special permission and the resulting duty to

give warnings of danger and proper instructions to prevent injury.

Plaintiff testified that he asked the foreman in charge, a few days before the injury, for permission to use the saw for the purpose of ripping the board, and that the foreman said, "Yes," then added, "Wait until we invoice." Plaintiff testified further that he had no personal knowledge that the invoice had been taken when he used the saw, but took it for granted. There is no competent evidence to establish that fact. It is not shown that, after having assumed the invoice had been taken, he renewed his request or subsequently obtained permission. He stated he did not know that, while using the saw, he had been observed by the foreman. The latter testified the injury was inflicted before he knew what plaintiff was doing. Knowledge of defendants, before the injury, that plaintiff was using the saw is not shown. Plaintiff voluntarily went outside of the scope of his employment, without the permission or the knowledge of defendants, and operated the rip-saw by which he was injured. Under such circumstances an employer is not chargeable with actionable negligence for failing to give warnings of danger or instructions to prevent injury. *McMahon v. O'Donnell,* 32 Neb. 27; *Stodden v. Anderson & Winter Mfg. Co.,* 138 Ia. 398, 16 L. R. A. n. s. 614; *Sinclair v. Berndt,* 87 Ill. 174.

It is suggested that plaintiff had implied permission to use the saw, and that, in doing so, he acted within the scope of his employment. These suggestions are based on evidence that plaintiff, about two weeks before the injury, had used the saw four hours in cross-cutting boards. From this experience permission to use it generally, or at the time of the injury, cannot fairly be inferred. He then acted under special directions from the foreman and used a gauge. He was not required to put his hands near the saw. There was increased danger in the attempt to cut a narrow board lengthwise. He had never been allowed to do that kind of work. He did not prove his case. For that reason, the

judgment in his favor is reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., not sitting.

HAMER, J., dissenting.

When the foreman told the plaintiff, on his request, that he could use the rip-saw to rip the board, that was consent to do the dangerous act, and the further statement of the foreman, to "wait until we invoice," did not take away the consent, and at most was only a request by the foreman to defer the act of sawing the board. The permission to rip the board should have been followed at once by special instructions or a positive command to wait until after they were given. The boy was carelessly turned loose, and the injury is the result. The judgment should be affirmed.

LEOPOLD KURPGEWEIT V. STATE OF NEBRASKA.

FILED FEBRUARY 12, 1915. No. 18,829.

1. **Larceny**: INFERENCE OF GUILT: UNEXPLAINED POSSESSION. In a prosecution for cattle-stealing, the jury may infer guilt from defendant's unexplained possession of the recently stolen animals.

2. **Criminal Law**: WITHDRAWAL OF REST: DISCRETION. In a prosecution for larceny, it is within the discretion of the trial court to permit the state to withdraw its rest and prove the ownership of the property as charged in the information.

3. ———: INSTRUCTIONS: CONSTRUCTION. In a criminal prosecution, an instruction that defendant is entitled to the presumption of innocence as a matter of evidence, and another instruction that the evidence is what is said by the witnesses on the stand, should be construed together, and, when thus considered, they are not inconsistent or erroneous.

4. ———: APPEAL: AFFIRMANCE. In the appellate court, a judgment will not be reversed unless error in the proceedings below is affirmatively shown by the record.

5. ———: ———: REFUSAL OF INSTRUCTION. The refusal to give a requested instruction is not erroneous, where its substance is properly given in a different form.

ERROR to the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

Willis E. Reed, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

ROSE, J.

In a prosecution by the state in the district court for Madison county, Leopold Kurpgeweit was convicted of cattle-stealing, and for that felony was sentenced to the penitentiary for a term of not more than ten years nor less than one year. As plaintiff in error, he now presents for review the record of his conviction.

The first objection to the judgment is that the verdict is not sustained by the evidence. Defendant was accused of stealing seven cows and five heifers, the property of Herman Kurpgeweit, of the value of $500. There is proof tending to show: Defendant and the owner of the cattle are brothers. Both are farmers, defendant living west of his brother. There is a quarter section of land between their possessions. Their houses and barns are north of a public highway running east and west. The stolen animals are described as red. They were horned cattle and were unbranded. During the evening of October 1, 1913, the cattle mentioned and a black cow were inclosed for the night in the corral of the owner on his premises. The next morning they were missing. The fence wires at the northeast corner of the owner's pasture had been cut. On the west side the conditions indicated that the posts had been pulled out, that the fence had been thrown on the ground, and that it had been put back in its place. Defendant made no inquiry or search, though he was promptly notified of the loss. He offered to loan a saddle to be used by the owner of the stock in making a search which might

take him away from defendant's premises. The owner, public officers and others made searches extending into several counties. The black cow returned alone, unharmed, October 5, 1913. The other missing animals were found in defendant's pasture October 10, 1913, and were there identified in presence of the sheriff. They had been recently dehorned and bore the fresh marks of the mutilation. Some of the tails had been cut. On one cow there had been an attempt to destroy an identifying mark. In the left ears of the animals the letter "L" had been rudely cut. They were grazing with some of defendant's red cattle, and the latter bore similar marks of fresh branding and of dehorning. Defendant claimed to be the owner of the stolen cattle after they were found in his pasture. He afterward gave as a reason for taking them that they were mortgaged, and that the mortgagee would be the loser instead of his brother. In this summary there is no attempt to make findings or to recite facts or to mention any evidence on behalf of defendant. The purpose is to outline some of the proofs in support of the charge against accused, for the purpose of testing the sufficiency of the evidence to sustain the conviction. There is no direct testimony showing when or how the cattle got into defendant's pasture. Defendant adduced proof tending to show that, owing to the conditions of the weather and the pasture, live stock had a propensity to break out of inclosures, and that teamsters drove through gates across defendant's farm, but the jury did not draw from testimony of this character the inference that the missing cattle strayed or broke into defendant's pasture. Defendant and his wife and their son testified as witnesses, but there was no attempt on the part of any one to explain why cattle belonging to defendant and similarly colored cattle owned by his brother bore alike the fresh marks of branding and dehorning when found. The return of the black cow, which could not be disguised, is a suspicious circumstance. There is nothing in the record to make the testimony on behalf of the state unbelievable. The evidence will sustain a finding that a proper explanation of defendant's possession of the recently stolen

cattle in the mutilated condition described was not given. In a recent case the law was stated thus: "The unexplained possession of stolen property, shortly after the theft of it is a fact which may justify the jury in inferring that the person so in possession is the thief." *Palmer v. State,* 70 Neb. 136. To the same effect: *Williams v. State,* 60 Neb. 526; *Dobson v. State,* 46 Neb. 250; *Robb v. State,* 35 Neb. 285; *Thompson v. State,* 6 Neb. 102. The conclusion is that the verdict is sustained by the evidence.

An order permitting the state to withdraw its rest and to prove the ownership of the cattle is challenged as erroneous. The information was notice that evidence of this nature was essential to a conviction. Defendant could not have been surprised by its introduction. The ruling was within the discretion of the district court. *Blair v. State,* 72 Neb. 501; *Hans v. State,* 50 Neb. 150; *Clough v. State,* 7 Neb. 320.

Many rulings in the exclusion of testimony on behalf of defendant are pointed out as erroneous, but they are not properly presented for review. There is a failure to comply with the rules relating to assignments of error in briefs. Principles of law asserted to be violated in rejecting testimony are not stated. The materiality of the rejected evidence to the plea of not guilty or to the disproval of any part of the state's case is not in many instances shown. In answer to questions in proper form, witnesses were permitted to testify to matters excluded without error earlier in the trial. There are few offers of proof indicating the purpose of the rejected testimony. In determining whether plaintiff had a fair trial, however, all of the rulings challenged have been examined without finding an error prejudicial to defendant.

The following instruction is criticised as erroneous: "The evidence is not what counsel on either side said to you in their opening statements, nor what they have said to you in the course of argument, nor what they may have said to the court in your presence. The evidence in this case is what the witnesses have been permitted to say to you while upon the witness-stand. And any statement made by any

witness upon the stand which was ordered stricken by the court is not evidence in this case, and is not to be considered by you in determining your verdict."

The criticisms are: The jury were prevented from considering the presumption of innocence. Neither party requested the instruction. It prevented defendant from having the benefit of counsel. The language used is argumentative. The criticisms are all without merit. The law was correctly stated. The first criticism is answered by the following instruction:

"The law presumes this defendant to be innocent, and this presumption carries with it all that a presumption of innocence implies, and is matter of evidence to the benefit of which the defendant is entitled until his guilt is proved by the evidence to your satisfaction beyond a reasonable doubt, and follows and remains with him throughout until removed by the evidence beyond a reasonable doubt, and must be recognized by you in your deliberation."

The two instructions, when considered with the entire charge, as they should be, are not inconsistent, but give defendant the benefit of the presumption of innocence as evidence. The trial court may give a proper instruction applicable to the evidence, though neither party requested it. The jury were not directed to disregard the arguments of counsel, unless they misstated the evidence. What was said in argument by counsel does not appear in the record. It follows that in this respect error in the instruction is not affirmatively shown. It is equally clear that the direction of the trial court is not objectionable as being argumentative.

Another instruction is also assailed by defendant, but it is applicable to the evidence and has often been approved.

The refusal to give a requested instruction is the subject of another assignment, but its substance was properly given in a different form. There is no error in the record, and the judgment is

AFFIRMED.

MORRISSEY, C. J., not sitting.

HAYDEN W. MITCHELL, APPELLANT, V. MAHLON C. BRESSLER, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,984.

Trial: DIRECTION OF VERDICT: EVIDENCE. Where at the close of plaintiff's case in the trial of a law action the evidence is clearly insufficient to sustain a judgment for the plaintiff, it is the duty of the trial court to direct a verdict for the defendant.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

Charles H. Kelsey and *J. W. Rice,* for appellant.

O. A. Williams, contra.

FAWCETT, J.

Appeal by plaintiff from a judgment of the district court for Antelope county, entered upon a verdict directed for defendant.

The controversy in this case is over an oral agreement, which plaintiff claims was entered into in 1907, under which, it is alleged, defendant was to furnish the money to purchase a tract of land in Antelope county, for $3,300; that both parties should endeavor to dispose of the land for money or exchange for other property; that when such a deal should be closed there should be added to the amount received for the land the rents and profits thereof, and from this gross sum defendant should be reimbursed for all moneys expended by him in purchasing the property, paying taxes thereon, and caring for the same, and the remainder divided equally between the parties. Plaintiff claims to have fully performed his part of the contract; alleges that defendant refused to convey the land, but has elected to retain the same for his own use and benefit. Defendant denies the making of the contract, as alleged, and claims that at the time he purchased the land plaintiff represented that he had a man, who was the owner of a stock of goods worth $10,000, who would trade the stock

for the land, and that defendant stated that if he made the deal for the stock he would give plaintiff one-half of all he made on the deal over and above the money he had put in, with interest; that upon examining the stock he found that it was worth not to exceed $1,500, and he therefore refused to make the deal; that he then orally suggested to plaintiff that if plaintiff could find a good deal for the land, promptly and without delay, he would still hold the matter open and give plaintiff one-half of the profits. The answer further pleads the four years' statute of limitations, and alleges that the oral agreement, under which plaintiff claims, is in conflict with section 6022, Ann. St. 1911, and that since purchasing the land he has placed valuable improvements thereon of the approximate value of $2,000; denies all other allegations in the petition. The reply is a general denial.

The errors relied upon for reversal are: That the court erred in sustaining defendant's motion for a directed verdict, for the reason that the verdict is not sustained by the evidence but is contrary thereto; that the court erred in sustaining objections to the offer of plaintiff to prove the market value of the land on February 2, 1910. It is said in the brief of counsel for plaintiff that the construction of the court seemed to be based upon two propositions, the second of which they state is: "That the appellant did not show that the appellee had ever refused to perform any of the terms, that the appellee therefore had never breached the contract." As this proposition is decisive of the case, it is the only one we deem it necessary to consider. Let the testimony of the plaintiff answer the proposition. He testified as follows: "Q. When did he first intimate to you that he was no longer willing to live up to the terms of this deal? A. I don't know as he ever intimated to me that he would not live up to the terms of this deal. Q. When did you first make demands of settlement? A. 1910. Q. What time in 1910? A. February 2, 1910. Q. How do you fix that time? A. Because Mr. Bressler and I were settling up another deal of the same nature, and after we had settled that up and he had paid me my profits I says,

'Now, Mal, what is the matter of fixing up this old deal that has been hanging fire for so long?' 'Now, Hade,' he says, 'I will tell you whenever we sell this land I will fix that satisfactory with you, and don't have any hard feelings about it.' Q. Did he intimate at that time that he intended to keep the land? A. Well, he said, 'When we sell the land I will fix it satisfactory with you.' Q. Well, did he ever tell you he would not sell the land under the terms of this deal? A. No, sir." In addition to this, the testimony of plaintiff himself shows that, while he showed the land to a number of parties, he never produced but one person, Mr. L. B. Harris, who had property of sufficient value to justify the defendant in making an exchange with him. Harris had a stock of merchandise which, according to the evidence, seems to have been of sufficient value to have warranted an exchange, but this trade fell through, for the reason that Mr. Harris was unable, for some cause not disclosed, to close the deal. He testified: "The proposition was left open for a few days, I was to make some other arrangements, which I don't remember now, if I could do, then I could make the deal, otherwise I could not, I couldn't close it." There is no testimony in the record to show that plaintiff ever produced any one else who was ready, willing and able to purchase the land, as alleged in the petition. There was, therefore, no competent evidence in the record to show that defendant had ever refused to carry out the contract alleged by plaintiff, even had such contract been made as alleged. There being no evidence that plaintiff had, on or prior to February 2, 1910, refused to carry out the contract which plaintiff alleges, the court did not err in refusing to admit testimony as to the value of the property on that date.

An attempt was made to prove by a letter which counsel for plaintiff received from defendant, of date February 15, 1912, that defendant then refused to carry out the contract. The offer of this letter was refused. No error is assigned on account of such refusal, for the reason, doubtless, that the letter itself does not contain such refusal. The most that can be said for the letter is that defendant

at that time claimed that he had not made the agreement alleged by plaintiff, and that he did not think plaintiff had any just demand against him. If the letter had been received in evidence, we think it would, in other respects, have been more damaging to plaintiff than to defendant.

The conclusion we have reached on the evidence renders a consideration of the authorities cited unnecessary. It is sufficient to say that they are not applicable to the state of facts shown in this case.

AFFIRMED.

MORRISSEY, C. J., SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. CHARLES OLSON, APPELLANT, V. HERMAN M. CLANEY ET AL., APPELLEES.

FILED FEBRUARY 12, 1915. No. 18,717.

Abatement: PENDENCY OF ANOTHER ACTION: MANDAMUS. The plea in abatement of another action pending in the same court between the same parties, regarding the same subject matter, and in which the relief sought is practically the same, is a good defense to a second action; and this rule is applicable to proceedings in mandamus.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

William V. Allen and *William L. Dowling*, for appellant.

H. Halderson, contra.

FAWCETT, J.

At the general election, April 7, 1914, there was submitted to the voters of the village of Newman Grove the question of license or no license for the sale of intoxicating liquors. The election board received and counted 233 votes, of which 117 were for and 116 against license. At the

same election there were to be elected three village trustees. There were five candidates for these three offices, whose names all appeared on the ballot "by petition." Below the names of these candidates there was printed on the ballot on two separate lines, "For Saloon License," and "Against Saloon License." Opposite each was the usual square in which the voter was required to make his mark. Similar squares were opposite the names of the five candidates for trustee. Above the voting squares for the election of trustees there was printed, "Vote for three." On one ballot the squares opposite the names of four of the candidates for trustee were marked and the square opposite the words, "Against Saloon License," was also marked. The election board, after considering this ballot, decided that it was a spoiled ballot and did not count it for any of the candidates for trustee or for or against license. The village board canvassed the returns filed by the election board and declared the result of the election to be for saloon license. On June 8, 1914, the relator applied to the district court for Madison county, for a writ of mandamus to compel the election board to reconvene and complete the performance of its duty by counting the ballot above referred to, which, if counted, would, as alleged, make the vote on the license question a tie. He also prayed that the writ require the village board to convene and recanvass the vote. A demurrer by the village board to the petition for the writ was sustained, and a demurrer by the election board overruled; whereupon the members of the election board answered. In the fourth paragraph of their answer they allege: "Further answering, these respondents aver that on or about the 27th day of April, 1914, the relator herein commenced a proceeding in the county court of Madison county, Nebraska, against the parties who are respondents herein, the purpose and object of which was, and is, to contest the election upon the said liquor license proposition, which proceeding is now pending and undetermined in the district court for Madison county, Nebraska, and that A. T. Rodman, who is the clerk of said village of Newman Grove, Nebraska, has been cited to appear in said proceeding, and

bring with him and produce in said court the tally sheet, certificates, poll books, list of voters, and ballots, and all papers relating to the said election, and upon his obeying said citation there will be nothing to do for this election board except the idle ceremony of reconvening."

Relator filed a motion to strike certain parts of the answer. The third paragraph of his motion is as follows: "The relator further moves the court to strike out all of paragraph 4 of said answer because the same is the statement of a conclusion and not the averment of an issuable fact; said paragraph has reference to a contest proceeding instituted in the county court of Madison county, Nebraska, but in no manner connected with the subject and purpose of this action, and it is not averred that the question involved therein has become *res adjudicata,* nor do the matters therein stated constitute a defense or an excuse for the failure of the respondents to perform their duty as averred in the petition."

While this pleading is denominated a motion, we think the third paragraph is clearly a general demurrer to the fourth paragraph of the answer, on the ground that it does not state a defense to plaintiff's action, and it will be treated as such. The reply to the answer and return of the members of the election board is a general denial of every affirmative allegation therein contained. The trial court found that the election board duly canvassed all the votes cast at the election on the license question; that, in canvassing the same, they canvassed and considered the one ballot in controversy as a mistaken ballot, rejected the same, and did not count it for or against the license proposition; further, that the relator has a plain, adequate remedy at law to contest all errors, etc.; and entered judgment in favor of the respondents against the relator and dismissed his action with costs. From this judgment the relator appeals, and, from the ruling of the court striking out paragraph 4 of their answer, the respondents, the members of the election board, present a cross-appeal.

We do not deem it necessary to consider relator's assignments of error seriatim, for the reason that in our judg-

ment the case must be decided adversely to his contentions upon a proposition settled by our former adjudications that, even if the remedy by mandamus existed in favor of relator, a point which we do not concede, another remedy, equally as available and equally as adequate, also existed in his favor, viz., the right to contest the election; and that, where two remedies exist, and the one in whose favor they exist elects to proceed for the enforcement of one and institutes a proceeding therefor, he cannot avail himself of the other while such proceeding is pending. *State v. Matley,* 17 Neb. 564, *State v. North Lincoln Street R. Co.,* 34 Neb. 634, and *Monroe v. Reid, Murdock & Co.,* 46 Neb. 316, 331, where the same rule is announced, and *State v. North Lincoln Street R. Co., supra,* is cited and followed. See, also, *Bartley v. State,* 53 Neb. 310, 322, where the two last above cases are cited with approval, as is also done in *Spencer v. Johnston,* 58 Neb. 44, 48. In *State v. Matley, supra,* at page 568, Maxwell, J., speaking for the court *in re* the two remedies, said: "He may contest the election, however, instead of proceeding by mandamus, and may have sufficient cause for doing so, as where illegal votes were cast for his competitor. But whatever the cause, having chosen his remedy, he must exhaust that before instituting other proceedings. The whole theory of our civil procedure is to avoid a multiplicity of suits, hence the plea of another action pending between the same parties and for the same cause of action is a good plea in abatement. A proceeding to contest an election is substantially an action, and, as it was pending when this proceeding was instituted, that remedy must be exhausted before relief will be granted in this." In *State v. North Lincoln Street R. Co., supra,* in the second paragraph of the syllabus we held: "The plea of the pendency of another suit in bar is applicable to proceedings in mandamus." In the seventh paragraph of the syllabus in *Monroe v. Reid, Murdock & Co., supra,* we held: "The plea in abatement of another action pending in the same court between the same parties, regarding the same subject matter, and in which the relief sought is practically the same, is a good defense to a second ac-

tion, and the fact that one is an action at law and the other in equity is immaterial." In the light of these authorities, we think we may well say that the rule above stated should be considered as settled in this state.

Treating that part of the motion of relator, which assails the fourth paragraph of the answer of the respondents, as a demurrer, the fact stands admitted that at the time this action was commenced, on June 8, 1914, there was still pending and undetermined, in the same court, a proceeding that had been instituted on or about April 27, 1914, by the relator in this action as contestant in that, and against the same parties who are respondents in this action, to contest the same election upon the liquor license proposition that is involved in this action. This being true, relator can obtain in that contest proceeding a full and complete investigation and decision of all of the questions which he raises in this action. Having elected to travel that road, he should be required to travel it to the end. This conclusion disposes of the two points: (a) That the court erred in sustaining the demurrer of the members of the village board; and (b) in refusing to permit the ballots of McElhoes and Ward to be taken from the ballot box and used in evidence.

Upon a consideration of the whole case, we think the district court was right in disposing of the case on the ground stated in its judgment; but, if that point were in doubt, there can be no doubt but that upon the record before us no other judgment could have been properly entered than the one complained of.

AFFIRMED.

MORRISSEY, C. J., SEDGWICK and HAMER, JJ., not sitting.

IN RE GUARDIANSHIP OF GEORGE G. WILLIAMS.

FRANCIS A. AMSBERRY, GUARDIAN, APPELLANT, V. GEORGE G. WILLIAMS, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,966.

Appeal: DISMISSAL. Upon appeal to this court, when the record shows affirmatively upon its face that there is no question presented thereby as ground for reversal that has not heretofore been plainly and unequivocally decided by this court, the appeal will upon motion be dismissed.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Appeal dismissed.*

Charles W. Beal and *A. L. Chase,* for appellant.

Silas A. Holcomb and *A. P. Johnson, contra.*

SEDGWICK, J.

A motion is made to dismiss the appeal upon several grounds, one of which is, in substance, that no error is shown upon the record, and that it appears upon the face of the record that no substantial question is presented for determination by this court.

The transcript shows that a petition was filed in the county court of Custer county by Francis A. Amsberry, a guardian of George G. Williams, a minor, showing that as guardian he received $975 and has paid out $907 belonging to the estate; that there are unpaid costs, attorney's fees, guardian's fees, and he asks that the court approve the final settlement and discharge him as guardian. From a decision against him in that court he attempted to appeal to the district court. In the district court a motion was filed by the ward to dismiss the appeal for the reason that no appeal bond had been given. The motion was overruled, but afterwards the former order was vacated, the motion sustained, and the appeal was dismissed. A supersedeas bond was then filed for an appeal to this court in

the sum of $1,800. A transcript of the record was afterwards filed in this court, showing the petition, motion to dismiss, and final order dismissing the appeal.

This court has expressly decided that, when a guardian or administrator is personally interested adversely to the estate of the ward or of the decedent, he must give bond upon appeal. In *Thompson v. Pope,* 77 Neb. 338, the syllabus does not exactly state the proposition, but the court in the opinion quotes from *Rhea v. Brown,* 4 Neb. (Unof.) 461, "It may well be said that section 44, ch. 20, and section 234, ch. 23, Comp. St., rightly construed, mean only that executors, administrators and guardians are not required to give bond when they appeal in their representative capacities, and that when they appeal in their personal capacities, from judgments rendered against them personally, they should give bond the same as other litigants," and approves of this construction of the statute. Afterwards in the case *In re Estate of O'Brien,* 80 Neb. 125, this is assumed to be the law, although it is not directly so determined in that case.

It therefore follows that in this case, as it was solely a contest as to the interest of the guardian as against the estate of his ward, the guardian could not appeal from the probate court to the district court without giving bond. The record shows this fact. The district court therefore plainly did right in dismissing the appeal, and in such case, under our more recent holdings, this court will not put the parties to the delay of a couple of years when the appeal to this court is clearly frivolous. In other words, there is no question presented in this record, as plainly appears from the record itself, which could be urged as ground for reversal, except the one question which has been plainly decided by this court.

The appeal, for that reason, is

DISMISSED.

NICHOLAS WECKER, APPELLANT, V. RUDOLPH DOMMER, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,985.

1. **Highways:** ESTABLISHMENT: PRESCRIPTION. The rule that "to establish a highway by prescription there must be a continuous user by the public under a claim of right * * * for a period equal to that required to bar an action for the recovery of title to land" applies in establishing a highway by prescription alone. When the proper authorities have attempted to establish a highway, proceeding under the statute, and the owners of the land affected have acquiesced therein, if the authorities have exercised some jurisdiction over the road by building necessary bridges or culverts to facilitate its use by the public, and it has been so used as a road for more than ten years, the rule is not applied with strictness.
2. ———: ———: EVIDENCE. The fact that a creek crossing the alleged public road is not bridged, and travel must go upon adjoining lands in order to cross the creek, is a circumstance tending to show that the road is not a public highway, but the fact that the authorities have neglected to make the creek passable on the line of the alleged road is not of controlling importance, especially when the owners of adjoining lands make no objection to the use thereof for such purpose.
3. ———: ———: ———. The evidence indicated in the opinion is found sufficient to support the decree.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

O. S. Spillman and *M. H. Leamy,* for appellant.

C. H. Stewart, contra.

SEDGWICK, J.

The plaintiff is the owner of the west half of the southwest quarter of a section of land in Pierce county. The defendant is road overseer, and was proceeding to remove a fence which the plaintiff had placed on the section line between his 80 and section 20 on the south, on the theory that it obstructed the public road. The dispute is as to whether there is a public road running east and west be-

tween sections 17 and 20. The plaintiff brought this action in the district court for Pierce county to restrain the defendant from removing the fence. The defendant by answer and cross-petition asked that plaintiff be enjoined from obstructing the road. The trial court found the issues in favor of the defendant, and dismissed the plaintiff's case, and enjoined plaintiff as prayed in defendant's cross-petition, and plaintiff has appealed.

There is evidence in the record as to the use of this road by the public for more than 20 years. The plaintiff cites *Lewis v. City of Lincoln,* 55 Neb. 1, in which it was said: "To establish a highway by prescription there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land." He also cites other similar decisions. This rule applies when it is attempted to establish a highway by prescription only. When there has been an attempt by the public authorities to open a road, and pursuant thereto the public, supposing that the road has been established by regular proceedings, have used it as a public road for so long a period, that rule is not applied with such strictness. In such case any attempt of the authorities to improve the road with the knowledge of the adjacent landowners, and without objection on their part, is important in determining whether the public has used the road under claim of right.

It appears that a petition was filed with the county board asking for the opening of a road on the section line, commencing at the southwest corner of section 17, and running thence along the section line five miles east. The county commissioners' record and evidence show that in December, 1882, this petition "was granted as prayed for." This plaintiff was then one of the three county commissioners, and it appears that a short time afterwards he built a fence along the south side of his land about two rods north of the section line. This fence appears to have remained in that position until about five or six years be-

fore the trial in the lower court, at which time the plaintiff appears to have removed the fence to the section line. This new road which the county commissioners attempted to authorize was used more or less as a public road, although not very extensively, until the plaintiff's fence was removed to the section line. There was a creek crossing the section line at or near the southeast corner of the plaintiff's land, which appears to have been impassable at that point. It was necessary to drive north for about a quarter of a mile and cross this creek at a ford and then return to the section line road. For more than 20 years after the attempt to establish this road there appears to have been no objection made by the landowners to this deviation from the section line. At the time of the trial there had been fences built so that it was necessary to open several gates in crossing the fields to this ford and returning to the road. Not long after the order of the commissioners referred to, there was a bridge or culvert built to connect this road with the main thoroughfare running north and south at the west end of the road. There was evidence that this was done by the public authorities for the purpose of connecting this new road with the main thoroughfare. The plaintiff testified that a neighbor who was interested in this new road was, with several others, building this bridge, and that this neighbor told the plaintiff that he was "working the county commissioners" to get the lumber for the bridge or culvert, and that he must not say anything about it. This neighbor died before the trial of this action, and if such evidence was competent it fails to overcome the positive testimony of witnesses that this work was done by public authorities.

We cannot attempt a complete analysis of the evidence in this case in regard to the use of this road, but it seems clear that at the time the action was taken by the county authorities it was considered by the authorities, and by the public generally, that the road had been opened and had become a public highway. It must have been so considered by the plaintiff himself, as he was not only a member of the board of county commissioners at the time, but also

built his fence in accordance with the accepted theory that the road had been opened, and the fence remained in that position for about 20 years. The fact that the creek was not passable at the place where the road crossed the section line, and that no crossing was constructed by the authorities, is perhaps a circumstance which might tend to show that it was not regarded as a public road if the evidence was otherwise doubtful; but the fact that the public authorities neglected to bridge this creek, and so made it necessary to trespass upon private lands, is not of controlling importance, especially since the owners of the land made no objection.

The evidence appears to be sufficient to support the decree, and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

MICHAEL EGAN, SR., V. STATE OF NEBRASKA.

FILED FEBRUARY 12, 1915. No. 18,699.

1. **Indictment:** RECEIVING STOLEN GOODS: DUPLICITY. The statute provides that an indictment for larceny of personal property may also contain a count for receiving or for concealing the same. Rev. St. 1913, sec. 9057.
2. ———: ———: ———. In a prosecution for receiving stolen property, it is necessary to allege and prove that the defendant knew that the property was stolen. Evidence that he participated in the larceny is competent for that purpose. The conviction will not be reversed because the defendant is also charged with the larceny.
3. **Criminal Law:** VENUE. Receiving property in this state, knowing it to be stolen and with intent to defraud the owner, may be prosecuted in this state, although it was stolen in a foreign state.
4. ———: MISCONDUCT OF JURY: SHOWING. The district court did not err in refusing to order a juror to appear and make affidavits of matters occurring in the jury room which would not amount to

such misconduct of the jury as to require the court to set aside the verdict.

5. **Receiving Stolen Goods**: PROOF. In a prosecution for receiving stolen property, it must be alleged and proved that the defendant received the property, knowing it to have been stolen and with intent to defraud the owner thereof.

6. **Criminal Law**: EVIDENCE: BOOK ACCOUNT. A memorandum of items of money paid by the witness is not competent in evidence as a book account.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

J. J. Harrington, M. F. Harrington and *Lee Card,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

This defendant was convicted in the district court for Dawes county of the crime of receiving stolen property, and has brought the case here for review by petition in error.

1. The information contains three counts. The first count charged that the defendant and his son John Egan, in the county of Dawes, state of Nebraska, did unlawfully and feloniously steal, take and carry away one mare, the personal property of one William Hanna. The second count charged the same defendants with receiving the stolen property, knowing that it was stolen, with intent to defraud the owner. And the third count charged the same defendants with concealing the same property. The jury found the defendant John Egan not guilty. The evidence shows that the property was in South Dakota, and, if it was stolen, was stolen in that state.

The defendant insists that the prosecution knew before the complaint was made that the animal was kept in South Dakota, and that, if stolen, it must have been stolen in South Dakota, and that therefore the defendants could not be convicted upon the first count of the information; that

the whole object in charging these defendants with stealing the property was to prejudice the jury against them in the other counts of the information; that the defendant was prejudiced thereby, and therefore has not had a fair trial. This contention is very earnestly presented and elaborately argued in the brief. It is said in the brief: "A man may be charged with larceny, and some of the jurors may believe him guilty of larceny and others not guilty, and, if the prosecution be confined to the one count, it would result in a disagreement or an acquittal. But you join with it a count for receiving the same property, knowing it to be stolen, and some of those who would acquit him of larceny may believe him guilty of receiving stolen property. You charge him in another count with concealing stolen property, and some of those who would acquit him both of larceny and of receiving stolen property with intent to defraud the owner will believe that he concealed the stolen property, knowing it to be stolen. In other words, he has to meet and defend three charges and not one, and he has to take his chances of an acquittal as against men some of whom believe him guilty of one count and innocent on another. The result is that the state has a tremendous advantage, because those who may believe him guilty on one count would not be able to convict him. But you get enough men believing him guilty on one count, and some more guilty on another count, and some more on still another count, and the end is a conviction by compromise of some kind." This is putting it pretty strong, and there may be some ground for such reasoning, but the same reasoning would apply to any and all cases in which there are more than two counts in an information, and we are not prepared to hold that the prosecutor cannot join different counts in an information.

It is said that there is no evidence in the case tending to show that the property was stolen in this state, and that a charge that it was so stolen was made for the purpose of allowing the prosecution to bring matters into the case for the purpose of prejudicing the defendant, and that such practice ought not to be allowed. In a prosecution for re-

ceiving stolen property, it is necessary to allege and prove the name of the owner of the property, if known, and that the defendant knew that the property was stolen and received it with the intention of defrauding the owner. It would seem that, without the count charging the defendant with having stolen the property, evidence that he did in fact steal the property might be competent as tending to show that he knew that it was stolen, and so, if the property had been stolen in a foreign country, evidence tending to show that the defendant participated in the larceny would of course show that he knew the property to be stolen, a necessary element to be proved.

It appears that the defendant and his sons owned and were using several tracts of land, all near the state line, some of them in the state of South Dakota and some in this state, and that Mr. Hanna received this animal from one of the defendant's sons some time in March, 1913. The animal was kept on Mr. Hanna's ranch, which adjoined the ranch of the defendant's son, and was situated in the state of South Dakota, near the state line. The animal was allowed to run upon the range and might have been in either state when stolen. We cannot see that the bitter charges of fraud against the prosecution are very substantially sustained. Our statute makes larceny and receiving stolen property and concealing stolen property three distinct offenses. It has been held that stealing property in another state is not a crime that can be prosecuted in this state. *Van Buren v. State,* 65 Neb. 223. It has also been held that receiving property in this state which has been stolen in another state may be prosecuted in this state. *In re Loomis,* 84 Neb. 493. Our statute also expressly provides that these several counts may be united in one information. Rev. St. 1913, sec. 9057. We think that this contention of the defendant is without merit.

2. Before filing his motion for a new trial, the defendant applied to the court for an order requiring the foreman of the jury to appear and give testimony as to matters that took place in the jury room. The court refused to make such order, and this ruling is now alleged as prejudi-

cial error. With this application the defendant filed an affidavit of his attorney in regard to statements made by the juror immediately after the verdict was rendered. It is insisted that these statements show that the witness would testify to matters that occurred in the jury room that would make the jurors themselves competent witnesses, and that the juror had refused to make an affidavit in regard to the matter. The affidavit stated a number of considerations that it is claimed influenced the jury that were not entirely proper, but it does not show that the witness could testify to any statements of facts made by any juror. The nearest approach to this is the allegation that the juror stated that all of the jurors knew that the Egan boys had been receiving stolen property. It does not appear that any juror stated that he knew that it was a fact and so influenced the jurors. Matters of opinion and arguments of jurors in the jury room are considered as inhering in the verdict, and as not such matters of misconduct as can be proved by the jurors themselves.

3. The state produced evidence tending to prove that Michael Egan, Jr., contracted to sell this animal to Mr. Hanna for $70; that Mr. Hanna took the animal on trial and afterwards made payments thereon, and after he had it for several months it was taken from the possession of Mr. Hanna and was found upon the ranch and among the horses of this defendant; that a short time afterwards one Philpot, who was a dealer in horses, went to defendant's place and contracted with him to purchase the animal with another of defendant's horses, and that on the next day the defendant sent the two animals to town to complete the sale. The state contended that the title to the mare was transferred to Mr. Hanna by the transaction between him and Michael Egan, Jr., and that Mr. Hanna had made substantial payments thereon; that one of the defendant's sons took the mare from Mr. Hanna's possession without his knowledge or consent under circumstances which amounted to larceny, and secretly conveyed her to the defendant's ranch, and that the defendant received her, knowing all of the above facts.

The defendant kept a large number of horses on his range. He appears to have been engaged principally in farming and horse raising. He sometimes bought and frequently sold horses. His older sons also transacted business independently of their father. They owned a large tract of land and were also engaged in raising horses. They bought large numbers of them and prepared them for market. Some of these horses were occasionally and perhaps frequently transferred from one ranch to the other across the state line, and this mare in question, while she was nominally in the possession of Mr. Hanna, was at times among the horses upon the range of the defendant's sons. There was evidence that Michael Egan, Jr., had purchased this animal with 50 or more others some eight years before the transactions in question, and that he made the arrangements with Mr. Hanna, placing the animal in Mr. Hanna's possession. The defendant testified that he knew nothing about that arrangement and never knew that such arrangements had been made. There was no direct evidence that he did. If it is to be found that the defendant knew that Mr. Hanna had an interest in this animal, it must be found from the relation between the parties and their manner of doing business, and perhaps from other circumstances. It was contended by the state that John Egan, who was 17 or 18 years of age and was residing with his father, took this mare from the range on the other side of the state line to his father's place secretly and without the consent of Mr. Hanna. The defendant testified that this mare, with three or four others, was observed by him upon his range a few days before the sale to Mr. Philpot, and that he supposed that they had returned voluntarily, and had no knowledge that they had been brought there intentionally. There was no direct evidence contradicting this testimony, and if it is to be found that John Egan did wilfully and secretly bring this mare to his father's ranch, and that the defendant knew that, it must be found from the circumstances in the case. We refrain from expressing any opinion upon the sufficiency of this testimony, since there may be other and different testimony if this case is to be tried again.

4. The defendant established his character and reputation for honesty in the community where he lives about as well as such a matter can be established by human testimony. Charles A. Weston, who is well known in the state, and has been formerly auditor and regent of the university, testified that he had known this defendant for 27 years; that he was well acquainted with all of the defendant's neighbors and with those who resided in the same community with the defendant and who have known him for a long time; that he knew the defendant's general reputation for honesty in the community where the defendant lives, and that his reputation was good. The defendant's neighbors were also called, and, when 6 or 7 such witnesses had testified emphatically to his good reputation for honesty, the state inquired how many witnesses they proposed to offer on that question, and it was announced that the defendant had 12 or 14 witnesses there for that purpose. The court then announced that 7 were sufficient and the number was limited accordingly. The state made no attempt to contradict or explain this testimony. The defendant's reputation for honesty must be considered as established by this evidence.

5. The court directed the jury to find the defendants not guilty under the first count, and instructed them that a material allegation of the second count is: "That defendants, Michael Egan, Sr., and John Egan, then and there being, did then and there unlawfully and feloniously receive and take into their possession the mare described in the information;" that the mare was stolen with intent to defraud the owner; and "that defendants then and there knew that said mare had been stolen." Also, "If you are satisfied from the evidence, beyond a reasonable doubt, of the truth of each one and all of the foregoing material allegations of the second count of the information, then you should find the defendants guilty as charged therein." It is contended that this instruction is erroneous in that it does not tell the jury that the defendant must have received the property with intent to defraud the owner. The inten-

tion to defraud the owner of his property is of course the gist of the offense. In *Goldsberry v. State,* 66 Neb. 312, 329, the court in one of its instructions told the jury: "The buying and receiving, knowing them to have been stolen, is the material part; and if you believe from the evidence, beyond a reasonable doubt, that the defendants bought or received the mule, or horses, or any of them, from any person whatsoever, knowing them to have been stolen, then you should find the defendants guilty as charged." This was held to be reversible error because it did not include the element of intent to defraud the owner. This instruction in the case at bar has the same defect and was peculiarly dangerous in the condition of this evidence.

6. It was contended in behalf of the defendant that this mare was taken by Mr. Hanna upon trial, and that the ownership of the property had never been transferred to Mr. Hanna. Mr. Hanna testified that he took the mare upon trial, and that afterwards, having become satisfied, concluded to keep her, and that the price agreed upon, in case he concluded to keep her was $70, and that he had made payments in small amounts from $1 to $3 each from time to time; and Mrs. Hanna also testified to payments made by her husband on account of the purchase of the mare. After the plaintiff had rested, Michael Egan, Jr., testified that the price was agreed upon between them, and that Mr. Hanna took the mare upon trial, and had never closed the agreement, and had never made any payments except certain small items of charges that Mr. Hanna had against him for shaving him from time to time. Of course the question as to payments made by Mr. Hanna was a very material question, and, after the defendant had rested, the state offered further evidence in regard to such payments. This was objected to as not proper rebuttal testimony. But the objection was overruled, and Mr. Hanna was called as a witness and produced a memorandum book in which he testified that he made entries of the payments on account of the purchase. After he testified, a leaf of the memorandum book containing the entries was offered in evidence, and was objected to on the ground that it was

incompetent. The objection was overruled and the statement was received in evidence containing entries of payments to Mr. Egan in small amounts. There was no evidence that this book was a book of original entries of general accounts, or otherwise competent as evidence under the statute. Evidence of the sale of the mare to Mr. Hanna and of payments made by him thereon was of course material upon the question of ownership of the property and should have been offered in chief by the state. In any view of the case, this memorandum was not competent evidence, and was, under the condition of the evidence, highly prejudicial to the defendant.

The nature of this charge and the character of the evidence required that the defendant's rights should be carefully protected. The prosecution was vigorous; the prosecuting attorney was not always as careful of the rights of defendant as the interests of the state demand. We cannot find from this record that the defendant has not been prejudiced by the rulings of the court and the instruction complained of. The judgment of the district court is reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., not sitting.

HAMER, J., concurs in conclusion.

W. E. WINTERRINGER, APPELLANT, V. C. O. SELLEN ET AL., APPELLEES.

FILED FEBRUARY 12, 1915. No. 18,827.

1. **Appeal:** BRIEFS. It is the duty of counsel in briefing a case for this court to comply with the rules, and so assist the court in the ready transaction of its business. If they fail to do so, the court will still correct any manifest error observed in the record, which is of such a nature as to have probably caused a miscarriage of justice.
2. **Intoxicating Liquors:** LICENSE: APPLICATION: REQUISITES: PROOF. In an application for a liquor license, the petition must state the

matters prescribed by the statute, and must be signed by the requisite number of resident freeholders. If a remonstrance is filed denying the allegations of the petition, the burden of proof is upon the applicant to establish those allegations. It is not required to establish the ownership of real estate for each of the petitioners, as in cases of trial of titles.

3. ———: ———: FREEHOLDERS: PROOF. In such case, when the remonstrants deny that any of the petitioners are freeholders, and refuse to admit the qualifications of those in regard to whom there is in fact no question, the signers may be called as witnesses, and if a signer of the petition testifies orally that he is the owner in good faith of certain specified real estate in the village, and in possession thereof, such testimony is *prima facie* evidence that he is a freeholder.

4. ———: ———: ———: ———. Resident freeholders, counted on the petition or for the purpose of making a larger number of signers necessary in a village of less than 60 freeholders, must own real estate in the village in good faith. If a small tract of land is conveyed to several persons for the purpose of qualifying them as freeholders in petitioning for license, or for the purpose of preventing the granting of license, such persons are not thereby qualified as freeholders, within the meaning of the statute.

5. ———: ———: BURDEN OF PROOF: ORDINANCE. When a remonstance duly filed with the village board specifically alleges that there is no ordinance of the village authorizing the issuing of a license, the burden is upon the applicant to prove the existence of such ordinance, and without such evidence no license can be granted.

APPEAL from the district court for Wayne county: ANSON A. WELSH, JUDGE. *Affirmed.*

Kingsbury & Hendrickson, for appellant.

A. R. Davis and *Fred S. Berry, contra.*

SEDGWICK, J.

This appellant applied to the village board of the village of Sholes, in Wayne county, for a liquor license. A remonstrance was filed, a hearing had, a large amount of evidence taken, and the board granted the license. The remonstrants appealed to the district court for that county, and upon trial in that court the decision of the village

board was reversed and the license canceled. The applicant has appealed to this court.

The appellant has not complied with the rules of this court in the preparation of his brief. He has not given us the assistance which he might and should have given us. He has practically disregarded rule 12. He relies upon the insufficiency of the evidence to sustain the verdict, and has presented us with a record of more than 400 sheets of evidence. There is no attempt to refer "with particularity by question and page to the evidence in the record supporting the contention made," nor to state separately "the propositions of law relied upon as necessarily involved in the decision of the case * * * numbered and separately stated, concisely and without argument or elaboration, and authorities relied upon as supporting them * * * cited with each proposition, respectively." His argument does not follow his brief "distinct therefrom."

He presents one proposition of law with some degree of compliance with the rule, and we have therefore examined that proposition with usual care. He says that the trial court decided "that, because the petitioners had not introduced the deeds in evidence, we failed to prove that the petitioners were freeholders." He does not refer us to the part of the record that contains such a decision; but, as that question appears to be involved in the case and is presented in both briefs, it appears to call for determination.

The petition for license is jurisdictional. It must state the matters prescribed by the statute, and must be signed by the requisite number of resident freeholders. If a remonstrance is filed denying the allegations of the petition, the burden of proof is upon the applicant to establish those allegations. The petition in this case contains the necessary allegations. The remonstrance denies generally all of the allegations in the petition. It then specifically denies each of those allegations, and denies that the purported signatures appearing on the petition and application are genuine, and that any of the persons whose names appear on the petition are resident freeholders of the village. It also de-

nies other jurisdictional matters. The applicant contends that the evidence in this record shows that there were only 18 resident freeholders in the village, and, as the statute provides that when there are less than 60 resident freeholders in the village a majority thereof shall be sufficient as signers of the petition, in this case 10 signers of the petition would be sufficient. Without determining whether the proper construction of the statute is that so small a number of petitioners is sufficient to justify the granting of a saloon license in a village, we will examine the question of law which the applicant presents. When there are 60 resident freeholders in a village, which is generally the case, there must be at least 30 signers of the petition. If it is necessary to establish the ownership of real estate for each one of these petitioners in the manner usually followed when titles are in dispute, the record would become very large, as is the record in this case, and the expense of the litigation would be proportionately increased. The difficulties of the trial would also be increased and the labor of the courts upon appeal. Fair dealing upon the part of the remonstrants would dictate that they should admit of the qualifications of those signers who are clearly qualified, and should specify with particularity in their remonstrance the names of those signers whose qualifications they intend to contest and the ground of such contest. If it is said that the proceedings before a village board, being before an administrative body, are not expected to be formal and accurate, it must also be conceded that the rules of evidence are not applied with the same strictness as in courts of justice. Even in the courts, when questions of title are not directly involved, the rule requiring the best possible evidence is relaxed, and in many cases it is permitted to introduce oral evidence of ownership and possession.

We think that when, as in this case, the remonstrance contains only a general denial of the qualifications of any and all of the signers of the petition, those signers may be called as witnesses, and when a signer of the petition testifies that he is the owner in good faith of certain specified

real estate in the village, and in possession thereof, such testimony is sufficient *prima facie* evidence that he is a freeholder. The brief of the applicant furnishes us but very little assistance in analyzing this evidence to determine which of these signers are and which are not qualified. The brief of the remonstrants assumes that the law is that no evidence is competent to show that these signers are freeholders except the best possible evidence of title to real estate. The evidence which he refers to in the record shows that very few of these signers produced their title deeds; but, as we have already said, oral evidence of ownership and possession was competent under the issues in this case.

The applicant, in support of his contention that there are but 18 resident freeholders in the village, contends that the remonstrants fraudulently conveyed real estate to a number of citizens for the purpose of increasing the number of resident freeholders. It appears that one of the remonstrants, who was greatly interested in preventing the issuing of a license, while the application was pending before the board, conveyed to 11 or 12 individuals an unimproved village lot. He testified that he sold the lot to these individuals for a tennis ground at an agreed price of $200; that some of them paid their proportion in cash upon delivery of the deed, others gave their promissory notes, and to several of them, among whom was a near relative of his residing in his family, he donated an undivided interest.

We have frequently held that the conveyance of real estate to a number of individuals to enable them to become signers upon the applicant's petition would not constitute such persons as freeholders, within the meaning of the statute. Of course, the same rule should be applied to the remonstrants. The object of the statute is to exclude transient persons who are without substantial interest in the matter, and to leave the final authority for authorizing saloons in the village to permanent residents who have substantial interest in the public welfare. When a small and not very valuable tract of land is conveyed to a large number of persons, instead of conveying to a trustee for such purpose, and this conveyance is made while the contest is

pending, and it is immediately insisted by those who are opposing the license that the grantees in such deed must be counted as freeholders for the purpose of preventing the granting of a license, the transaction would seem to come within the principle that has so frequently been applied to prevent the granting of a license upon the petition of such signers. Some of the grantees in this deed, it is claimed, were already freeholders of the village, and others were nonresidents; but they appear to have all been opposed to the granting of the license and to have assisted in contesting the same. It is difficult to ascertain from this record how many resident freeholders there are in the village. Counsel have limited their efforts upon this question to the inquiry whether the grantees in this deed were thereby qualified as freeholders, and have not in other respects given us much assistance in the examination of this record.

The remonstrants urged several grounds in support of the decision of the trial court, and, among them, it is contended that there was no ordinance of the village authorizing the granting of a license. The remonstrance filed with the board specifically alleged that there was no such ordinance, and now it is contended that there is no evidence in this record tending to show that such ordinance was ever enacted. It has frequently been held that such ordinance is necessary, and that the village board are without jurisdiction to grant a license in its absence. When it is specifically alleged in the remonstrance that no such ordinance existed, it devolves upon the applicant to furnish *prima facie* evidence, at least, of the existence of such an ordinance. The applicant has not referred us to any such evidence in this record, and we have not observed any.

The evidence is not sufficient to justify the issuing of a license, and the judgment of the trial court is therefore

AFFIRMED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissenting.

I dissent from all of the opinion except what relates to the affirmance. The judgment of the district court is affirmed on the sole ground that there is no proof of an ordinance authorizing the issuance of a license. If this ruling is correct, nothing else is essential to a decision on the merits of the appeal. All other expressions in the opinion of the majority are dicta. They are not binding as precedents. They obscure or confuse former decisions. Litigants with undetermined controversies are entitled to the time devoted to the preparation and the consideration of dicta. The public expense incident to the preparation, consideration and publication of opinions not necessary to a decision should be avoided. The official reports of decisions should not be incumbered by extraneous matter. In the future the supreme court should not be embarrassed by expressions of opinion not necessary to a decision in a former case. Owing to a statute requiring reiteration of settled principles of law, opinions have already been multiplied beyond reason.

The opinion of the majority, as I understand it, contains dicta at variance with rules of law deliberately announced by a unanimous court. A practice essential to the dispatch of judicial business requires an appellant to specifically point out the errors of which he complains. In my judgment there has been an attempt in the opinion of the majority to modify this rule by a dictum, and the method of proving that petitioners for a license are freeholders has been questioned, if not unsettled. *Swihart v. Hansen,* 76 Neb. 727; *Starkey v. Palm,* 80 Neb. 393; *Rosenberg v. Rohrer,* 83 Neb. 469. The dictum relating to the duty of remonstrants to admit the qualification of known resident freeholders is contrary to the following doctrine announced in *Swihart v. Hansen,* 76 Neb. 727: "Where the qualifications of the signers to a petition for the sale of liquor are put in issue by a remonstrance, the burden is upon the applicant to show by competent evidence that the petitioners do possess the qualifications required." To the same effect: *Rosenberg v. Rohrer,* 83 Neb. 469. If the

dictum in the fourth paragraph of the syllabus implies that remonstrants must be freeholders, it is at variance with the former opinion holding: "Under section 3, chapter 50, Compiled Statutes, the right to protest or remonstrate against the issuance of a license is not confined to residents of the ward or village where the intoxicating liquors are sought to be sold." *Somers v. Vlazney*, 64 Neb. 383. I cannot concur in dicta thus changing or modifying or indirectly overruling former decisions.

LETTON, J., concurs in the dissent.

STATE, EX REL. JOSEPH B. BRITT, APPELLANT, V. SIGEL MATSON ET AL., APPELLEES.

FILED FEBRUARY 26, 1915. NO. 18,586.

1. **Schools and School Districts:** BONDS: SUBMISSION OF PROPOSITION FOR ISSUANCE. "A proposition of a school district to issue bonds must be submitted separate and distinct from any other that is not germane thereto." *State v. Barton*, 91 Neb. 389.
2. ———: SCHOOLHOUSE: SELECTION OF SITE. *Held*, that under section 6737, Rev. St. 1913, the selection of a building site for a schoolhouse can be made only by the electors of the district at a district meeting, by a vote of two-thirds of the qualified electors present.
3. **Mandamus:** INCONSISTENT RELIEF. A peremptory writ of mandamus will not issue to compel the doing of an act inconsistent with the petition and inconsistent with the alternative writ.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed and dismissed.*

A. G. Wolfenbarger and *H. S. Lower*, for appellant.

Morning & Ledwith, contra.

MORRISSEY, C. J.

This was an application for a writ of mandamus addressed to the district court for Lancaster county. The

writ was issued, but not in the form prayed, and both parties appealed. The respondents are the officers of school district No. 139 of Lancaster county, a district not in a city of the metropolitan class, and the relator was an elector of said district. February 26, 1914, there was filed with the respondents a petition signed by more than one-third of the legal voters of the district "suggesting that a vote be taken for or against the issuing of bonds of said school district, * * * to purchase lots Nos. 27, 28, 29, 30, 31, 32, 33, 34, Hillcrest addition to the village of Bethany Heights, Nebraska, and to build thereon a school building and to fully equip the same with heat, light, water, sewerage and furniture." The respondents declined to issue a call to submit that question to the voters of the district, and an alternative writ was issued directing the performance of the acts as prayed in the petition, or, on failure to obey the order, to appear and show cause.

Three of the respondents answered and showed that they had at all times been ready and willing to grant the prayer of the petition, but, being less than a majority of the board and the other members refusing to call the election, as prayed, they were powerless to act. The other respondents answered, admitting their official positions, the filing of the petition, that it contained the names of more than one-third of the legal voters of the district, etc.; but denied that the act sought to be enforced by this proceeding was a duty required of them by law. They alleged that school district No. 139 adjoins another school district, and that a number of families residing in this adjoining school district had been set over into district No. 139 under section 6942, Rev. St. 1913, and that the parents of these children are qualified voters in said district on all school questions, except the issuance of bonds; that the district now has a school site with a schoolhouse thereon, and that the present site is nearer the geographical center of the district, and of the population thereof, than the site proposed in the petition for the bond election; that the proposition to purchase a new school site should be separately stated, and that the proposition should not designate any par-

ticular property, but the district should be left free to negotiate for a new school site upon the most advantageous terms, and left free to select the location which two-thirds of the legal voters of the district, including those outside the district, but legally entitled to vote, should select; that two propositions are combined in one, and that it is impossible for voters to vote for or against either proposition without voting for or against the other; that the petition as presented was not in such form as would authorize the calling of an election as prayed. A peremptory writ was issued, but not in the form or substance of the alternative writ. The court found that the selection of a specific building site for a schoolhouse can be made only by the electors at a school district meeting, and cannot be legally submitted to the electors at a bond election, and in this conclusion we agree. It further found "that at the time of the commencement of this action it was the duty of the school board of district 139 to call an election and to submit to the qualified electors the question of voting for or against the issuing of bonds of said district in the amount of $25,000 for the purpose of purchasing a building site and for the construction, equipment, including heat, light, water, sewerage and furniture, and furnishing of a school building or schoolhouse," and allowed a peremptory writ directing that the school district officers issue a call for an election according to said finding, and taxed the costs to the respondents, as members of the school board. The relator and respondents have separately and severally excepted and appealed.

The school district had a site. The effect of this bond election, if the proposition carried, would be the purchase of a new site and the transfer of the school thereto without giving the voters of the district an opportunity to vote on the question as provided by the statute. It is stipulated that not less than two families had been transferred from the adjoining district to district No. 139 for school purposes. The parents and guardians of these children were, under section 6942, Rev. St. 1913, entitled to vote upon all school matters except that of issuing bonds. Section 6737,

Rev. St. 1913, provides a method of changing the school site, and it is evident that the legislature did not intend that the school site might be changed in any other way. The method undertaken under these proceedings is a clear evasion of this section of the statute and is in violation of the rights of the voters who were entitled to vote upon this question alone, and it would effectually disfranchise those electors transferred from the other district who are not entitled to a vote upon the issuance of bonds.

The court could not split up the relators' cause of action, nor could it issue a peremptory writ differing in terms from the alternative writ. "The peremptory writ of mandamus, which has been likened to an execution, should conform strictly to the command of the alternative writ." *Laflin v. State,* 49 Neb. 614.

There are a number of other issues raised, but as those discussed dispose of the case it is unnecessary to comment upon them.

The judgment of the district court is reversed and the cause dismissed at the costs of the relator.

REVERSED AND DISMISSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

STEPHEN H. RICHARDSON, APPELLEE, V. HOWARD W. JOHNSON ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,024.

1. **Wills: ESTATE OF WIFE: RIGHTS OF HUSBAND.** In this state the wife cannot lawfully dispose of her real estate by will so as to deprive her husband of the interest given him by chapter 17, Rev. St. 1913.
2. **———: ———: RIGHT OF ELECTION.** Where a married woman by her will makes a provision for her husband of a less estate than is provided for him by the chapter above mentioned, he may renounce the provisions of the will and elect to take the estate given him by law.

3. ———: ———: SUFFICIENCY OF ELECTION. In making his election, no particular form of words is required, and if it clearly appears from the writing filed by him in the county court that he refuses to take the provisions made for him by the will and elects to take, have and receive the part of the estate which is given him by the laws of the state of Nebraska, this will constitute a sufficient election.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

A. C. Epperson, for appellants.

P. E. Boslaugh, contra.

L. E. Cottle, guardian ad litem.

BARNES, J.

This appeal requires a construction of some of the provisions of chapter 17, Rev. St. 1913. It appears that Emily D. Johnson, a resident of Clay county, Nebraska, in the year 1903, made a will by which she devised the net proceeds of certain real estate situated in Clay and Lancaster counties to Stephen H. Richardson, during his life, he being her husband at the time of her death, with the remainder over to Howard W., Alida May, Charles, Everett R., and Agnes Johnson, her grandchildren by a deceased daughter, who was her only child. On the 31st day of December, 1910, the testatrix departed this life, and her will was duly admitted to probate by the county court of Clay county on February 27, 1911. On April 1, 1911, plaintiff Richardson filed a writing in the county court, refusing to take under the provisions of the will, and electing to take the share of the estate of the testatrix given him by the laws of this state. Thereafter he commenced an action in the district court for Clay county to partition the said real estate. Issues were joined, and by an agreement of the parties a jury was waived and the cause was tried to the court. It was stipulated that the debts, liabilities of the estate, and the expenses of the administration had been paid and the estate had been duly adminis-

tered. The trial resulted in a judgment for the plaintiff, and the defendants have appealed.

It is contended by appellants that the plaintiff has no power or right, as the widower of Emily D. Richardson, to renounce the provisions of the will in his favor and take and have the part of the estate of his deceased wife which he would have taken and received if she had died intestate. It is also contended that, if this right existed in favor of the plaintiff, then the writing filed by him is insufficient to constitute a refusal and an election.

Section 1265, Rev. St. 1913, provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed, * * * which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following: * * * Third. One-half to the husband or wife, if the survivor is the parent of all the children of the deceased and there be only one child or the issue of a deceased child, surviving."

This section was construed in *Gaster v. Estate of Gaster*, 92 Neb. 6, where it was said: "A husband cannot lawfully devise his real estate or lawfully dispose of his personal property by will so as to deprive his wife of all interest therein given by the said act. Laws 1907, ch. 49. If a married man by his will disposes of all his property, real and personal, to others, and gives nothing to his wife, she will be entitled to take the distributive share given her by the statute as though he had died intestate." In the body of the opinion it was said: "The first, and perhaps one of the most prominent, difficulties in the construction of this act is that, in defining the rights of the husband or wife in the property of the deceased spouse, the statute contains the expression, 'not lawfully devised,' in the case of real estate, and 'not lawfully disposed of by will,' in the

case of personal property. * * * In this case the deceased devised all of his property, but made no provision for his widow. She insists that she ought to share in the property as though there was no will. The statute says that, when the real estate is not lawfully devised, she may do so. We are asked to hold that the property was lawfully devised, and that therefore the provision of the statute giving her a distributive share in the property has no application. * * * If the property which by this statute is given to the surviving spouse cannot be lawfully devised to others, the principal difficulty in construing the statute disappears." It was further said in the opinion: "It is wholly inconsistent with the idea that the right can be defeated by will. It recites the right of a married man or woman in the property of his or her spouse, provides in express terms how that right may be barred, and excludes the power to bar that right by will."

Section 1270, Rev. St. 1913, provides that a surviving husband or wife can be excluded from participating in the estate of a deceased spouse by an antenuptial contract made in lieu of the right of inheritance.

Section 1271, Rev. St. 1913, provides: "If any real estate be devised by a deceased husband or wife to the surviving husband or wife of such deceased person, or other provision be made for him or her in the last will and testament of such deceased person, he or she shall be entitled to his or her election to take the lands so devised, or the provision made for him or her in the last will and testament of such deceased husband or wife, or to take by inheritance, descent and distribution the interest in the estate of the deceased, provided by law."

The chapter of the Revised Statutes from which the foregoing quotations are taken is complete and comprehensive. By its provisions the husband and wife are placed upon exact equality as to the rights of each in the property of the other. The nature, extent and limitation of the rights of the surviving spouse, whether widow or widower, are exactly the same, and the law applicable to one is equally controlling as to the other.

In *In re Estate of Strahan,* 93 Neb. 828, it was said by Sedgwick, J., in his concurring opinion: "The title of the present act is 'An act to provide for succession to the estates of decedents and to repeal (sections named).' Under this act the husband and wife are placed upon exact equality as to the rights of each in the property of the other. * * * But now the husband succeeds to property of his deceased wife as the wife does to property of her deceased husband. The policy of our law, as developed by legislation from time to time, has been more and more to place husband and wife upon an equality as to their property, and to regard each as interested in the property held in the name of either. It may have been considered that the marital relation is of great importance to the state, and generally covers the active life of both parties. Their fortunes are made together, and by their mutual help and contribution."

It therefore seems clear that by the provisions of the act in question Richardson, the surviving husband of the testatrix, was entitled to one-half of the real estate devised by will to the defendants. It is contended, however, that the testatrix had lawfully devised this property right to the defendants; that the act of 1907 (laws 1907, ch. 49) did not repeal the section of the statute which gave Mrs. Richardson the right to will her property to her grandchildren, and therefore her estate was lawfully devised, and the plaintiff could take nothing except the interest which the will of the testatrix gave him. This contention cannot be sustained. The statute has always provided that either the husband or the wife may lawfully devise his or her real estate by will. In case the survivor accepts the provisions of the will, it may then be said that the estate has lawfully been devised, but we have always held that the widow of a testator may elect to abide by the provisions of the will or take under the statute, and under the present law the same privilege is accorded to the surviving husband.

This brings us to the consideration of the effect of the writing filed in the probate court by which the plaintiff rejected the provisions of the will and elected to take under the statute. The refusal and election of the plaintiff complies with every requirement of the statute. By his written statement he declared that he would not receive or accept the provision made in or benefit conferred on him by the will, and that he intended to take, have and receive the part of his deceased wife's estate given and awarded to him by the law of the state of Nebraska as the husband and widower of the deceased. The law makes no provision defining the terms in which the election shall be made. The intention of the plaintiff is clear and unambiguous, and by the use of the language employed he gave notice that he elected to take the identical interest expressed by the legislature by the use of the words "to take by inheritance and descent and distribution as by law provided." Indeed, it may be said that the language of the writing is more clearly correct as expressing the right and interest of the plaintiff as the surviving husband of the deceased than the words above quoted.

The record shows conclusively that the court could not well have rendered any other judgment than the one complained of, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

JAMES M. LANIGAN, APPELLEE, V. EDWARD GILROY ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,040.

Tax Sale: REDEMPTION: LIMITATIONS. Where the evidence on which a tax deed is executed is recorded with it and clearly shows that the deed is void, the owner may maintain an action to quiet his title and redeem his land from tax sale at any time within ten years after the recording of the deed.

APPEAL from the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed.*

E. P. Clements, for appellants.

T. P. Lanigan & Son and *J. R. Swain, contra.*

BARNES, J.

Action to quiet plaintiff's title to the south half of section 13, township 20 north, range 11 west of the sixth P. M., situated in Greeley county, Nebraska, to set aside certain tax deeds and redeem the land from the lien for delinquent taxes.

It appears that defendant Edward Gilroy purchased the land in question at tax sale on the 13th day of November, 1903, for the taxes assessed against it for the years 1894 to and including 1902; that he had paid the taxes subsequently assessed against the land for the years 1903 to and including the year 1908. It further appears that the time provided by statute for redemption of the premises expired November 13, 1905; that the purchaser failed to publish the notice for redemption required by statute until January 11, 1906, which was the date of the last publication of the notice; that the notice was directed to C. E. Fowler, while the deed records show that the land was then owned by Charles E. Fowler. The purchaser failed to file the affidavit required by statute authorizing the publication of the notice. On this record the county treasurer, on the 22d day of June, 1906, executed to the defendant Edward Gilroy a tax deed for each of the quarter sections of land described in his two certificates of purchase. It also appears that, after receiving his certificates of tax sale, Gilroy fenced the land in question with other large bodies of vacant, unimproved, prairie lands, and used the same as a pasture for his cattle. After receiving his tax deeds, he continued to so make use of the half section in question, with other lands which he had inclosed, as aforesaid. The plaintiff proved his title to the premises, and on the facts thus shown by the record the district court found generally for him, and rendered a judgment in his favor

canceling the tax deeds and quieting his title upon the payment of the taxes, interest and penalties, amounting to the sum of $357.85, with interest at the rate of 10 per cent. per annum from the date of the decree, which was declared to be a first lien on the premises, and that defendant Mary Gilroy had acquired no interest in the land in question. It was further decreed that, unless the sum so found due to the defendant was paid within 20 days, the land should be sold as upon execution to satisfy said lien. From that judgment the defendant Edward Gilroy has appealed.

Edward Gilroy contends that the judgment is not sustained by the evidence, and argues that the tax deeds were valid on their face; that, having taken possession of the land conveyed to him thereby, the plaintiff was barred by section 6558, Rev. St. 1913, which provides: "No action for the recovery of real estate sold for the nonpayment of taxes shall be brought after five years from the execution and recording of the treasurer's deed, unless the owner is at the time of the sale a minor, insane person or convict in the penitentiary, in which case such action must be brought within five years after such disability is removed." This contention might be sustained if it were not for the provisions of section 214, art. I, ch. 77, Comp. St. 1903, which were in force at the time Gilroy purchased the land for taxes. That section provides, in substance, that the evidence upon which a tax deed is issued shall be recorded therewith. This evidence consists of the notice of redemption and proof of service of publication, if service be so made, together with the affidavit authorizing such service. In the case at bar, service of notice of redemption was attempted to be made by publication, and the notices, together with the proofs, were filed with the deeds and duly recorded as a part thereof. The notices show that they were published long after the time for redemption had expired and without the affidavit authorizing the publication. The tax deeds were therefore void. The statute makes the evidence, on which deeds were executed, a part of the public records in the office of the register of deeds,

so that any person may have the opportunity of investigating and finding out for himself the true condition of the title. In *King v. Boettcher,* 96 Neb. 319, it was said: "Notice of the time when the redemption of land from tax sale will expire must be given by the tax purchaser or his assignees before the expiration of the time to redeem." In *Wells v. Bloom,* 96 Neb. 430, it was said: "A tax deed issued in 1904, upon a tax sale certificate issued on a treasurer's tax sale made in 1902, without a previous compliance by the purchaser with the requirements of section 124, art. I, ch. 77, Comp. St. 1901, is void and confers upon the grantee in such tax deed nothing more than color of title. And in such case the owner of the land may proceed at any time within ten years to quiet his title as against such tax deed and to redeem his land from such tax sale." If it be said that the tax deeds in question, when considered apart from the evidence on which they were executed, are valid on their face, they are nevertheless void, and the grantee acquired no rights by reason of their execution. *Stewart v. Ridenour, ante,* p. 451; *Peck v. Garfield County,* 88 Neb. 635; *Thomsen v. Dickey,* 42 Neb. 314; *State v. Gayhart,* 34 Neb. 192.

The judgment of the district court was right and is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

IN RE ESTATE OF FERDINAND VODVARKA. MARY KRAJICEK, APPELLANT, V. ESTATE OF FERDINAND VODVARKA, APPELLEE.

FILED FEBRUARY 26, 1915. No. 18,031.

1. **Wills: PROBATE: JURISDICTION.** When a county court had acquired jurisdiction of a proceeding to probate a will, and the hearing had been begun and some testimony heard, it did not lose jurisdiction merely by reason of the facts that by agreement between the proponent and contestant, with the consent of the county

judge, the further hearing was continued from time to time, and both parties appeared when the final hearing was had, although no entry was made of one of the continuances upon the docket.

2. ———: ———: DECREE: MOTION TO VACATE: SHOWING. A motion to open up a decree probating a will on the ground that the contestant was not informed of the time of the final hearing should set forth facts sufficient to show a *prima facie* defense against the probate of the will.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

F. Dolezal, contra.

LETTON, J.

On October 11, 1909, Ferdinand Vodvarka filed his petition in the county court of Dodge county setting forth that his father Ferdinand Vodvarka died in that county leaving surviving him four children and six grandchildren, and praying that the instrument produced by him be admitted to probate as the last will and testament of the deceased. The 3d day of November, 1909, at 9 o'clock A. M., was fixed for the hearing of the petition, and it was ordered that notice be given by publication and also by personal service on the resident heirs. Notice was duly given, and on October 3, 1909, Mary Krajicek, one of the children and heirs at law, appeared, and filed objections to the probate of the will on the ground that the testator was of unsound mind, and was induced to execute the instrument by undue influence. At the time set for the hearing, the three other surviving children and the plaintiff appeared personally and by attorney. Witnesses were sworn, and by consent the further hearing of the case was continued until November 29. On November 29 the attorney for the petitioner appeared and asked that the cause be continued to December 6, 1909, which was done. On that day the attorney for petitioner requested the hearing be continued until December 11, 1909. On that day, no one appearing, the hearing was continued to January 10, 1910, by order

of the court. On April 25 the petitioner appeared and asked to have the hearing continued until the 3d of May, 1910. On that day the petitioner appeared by his attorney, Frank Dolezal, and the contestant also appeared by her attorney, J. C. Cook, and the record recites: "No further evidence or proof being offered by the parties to this proceeding, by consent of counsel this cause was submitted to the court upon the petition of Ferdinand Vodvarka, and the objections of Mary Krajicek, and the testimony taken in open court on the 3d day of November, 1909, of Nick Diechmann and Fred Renter, the subscribing witnesses to said instrument, purporting to be the will of said deceased, also the testimony of Herman Holsten, witness for petitioner." The court then found that the will was valid in all respects and admitted it to probate.

On July 8, 1910, a motion was filed in the county court by Mary Krajicek to vacate the decree for the reasons that the continuances were irregular; that she had no notice of the hearing set for the 3d day of May, 1910; and that the court was without jurisdiction to act upon that day. This motion was supported by the affidavit of Mary Krajicek that she was not informed by her attorney or any one else of the hearing on May 3, 1910; that he had promised to notify her of the time the matter would be heard; that she knew nothing of the order until a short time before July 2, 1910; and also stated that "she has a good defense against said will being admitted to probate as the last will and testament of said deceased." Objections to the vacation of the decree were filed, supported by the affidavits of Frank Dolezal and of J. C. Cook. Mr. Dolezal's affidavit, in substance, is to the effect that several continuances were made by agreement between himself and Mr. Cook with the knowledge and consent of the county judge. Mr. Cook's affidavit corroborates that of Mr. Dolezal, and sets forth further that he explained to the contestant several times that she must produce witnesses to sustain the charges made in her objections, but that she failed to give him the name of any witness or disclose any proof; that he had made independent inquiries of the physician treat-

ing the deceased and of others, and that none of such persons showed any knowledge of facts tending to sustain the contest; that prior to the 3d day of May, 1910, he informed contestant of the date of the hearing, and that, unless she indicated to him or pointed out some witnesses with proof of the objections, he would have nothing further to do with the cases; but that the contestant did not appear on that day, although he had given her timely notice and ample opportunity to be present. The case was taken to the district court by proceedings in error. The district court found no error and affirmed the order of the county court.

The question presented is whether the court lost jurisdiction by the failure to continue the hearing from January 10, 1910, to a specified time. We are not of that opinion. The proponent had produced his evidence and rested. A county court in the exercise of its probate jurisdiction is not bound by the statute which fixes terms within which its jurisdiction in civil cases must be exercised. There is nothing in the statute to prevent a county judge from taking a case under advisement and rendering his decision at any time at which the parties are present either in person or by their attorneys. This is also the case where the proceedings are by agreement of the parties left open for a short time for the purpose of obtaining further testimony. None of the cases cited by the appellant are applicable to the facts presented here.

Furthermore, the allegations in the motion to open up the judgment and set aside the decree are inadequate. While pleading the conclusion that the contestant has a good defense against the admission of the will to probate, it entirely fails to set forth sufficient facts to constitute a *prima facie* defense.

The judgment of the district court is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

FRANK HAAR, APPELLEE, V. FRANK HOWARD, APPELLANT.

FILED FEBRUARY 26, 1915. No. 18,037.

1. **Appeal:** CONFLICTING EVIDENCE. A verdict rendered upon conflicting evidence will not be set aside unless it is clearly wrong.
2. **Trial:** INSTRUCTIONS. The instructions complained of, when considered with those given by the court at defendant's request, *held* to submit all the issues in the case to the jury.

APPEAL from the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Affirmed.*

Story & Story, for appellant.

J. C. Dort, contra.

LETTON, J.

This action was brought to recover upon a protested check given to plaintiff in payment for a mare purchased from him by defendant, who was a dealer in horses. Defendant admitted his liability on the check, but pleaded as a set-off that he had purchased another mare from the plaintiff, who fraudulently concealed her true character from him, and warranted her to be sound, but that she was a cribber and windsucker, was unsound, was worth only the sum of $92.50, instead of $185, which he paid for her, and that he was thereby damaged in the sum of $92.50, for which he asked to be credited on the amount due. Plaintiff recovered, and defendant appeals.

The first assignment of error is that the verdict is not sustained by the evidence. There was a direct conflict in the evidence with respect to warranty and false representations, but the clear preponderance was with the plaintiff. It is sufficient to sustain the verdict.

Complaint is made of the instructions given, and more specifically of instructions Nos. 8, 10 and 13, requested by plaintiff, for the reason that they eliminated as a set-off defendant's cause of action for deceit. These instructions treated of the law with respect to breach of warranty. Con-

sidered in connection with the instructions given at defendant's request, which covered the subject of defendant's right to recover on account of deceit and false representations, both defenses were submitted, and the defendant has no ground for complaint.

We find no prejudicial error in the two rulings of the court complained of with respect to the admission of evidence. The case turned upon an issue of veracity between a horse dealer, upon one side, and a young farmer living in Kansas, upon the other. The jury evidently believed the farmer and his witnesses and disbelieved the testimony of the horse dealer. Long experience has shown the writer that this is not an unusual result in suits of this nature.

We find no reason for reversing the judgment.

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

ALBERT N. ORCUTT, APPELLANT, V. JAMES H. MCGINLEY ET AL., APPELLEES; ALFALFA IRRIGATION DISTRICT, APPELLANT.

FILED FEBRUARY 26, 1915. No. 18,011.

1. **Taxation:** VOID ASSESSMENTS: EQUITABLE RELIEF: TENDER. Where assessments are wholly void and the owner of taxable property has no means of ascertaining what amount may be lawfully levied, he is not required to make a tender as a condition of obtaining equitable relief.
2. ———: ———: INJUNCTION. An injunction against the collection of void taxes levied against the owners of land in an irrigation district will not be denied because some have paid the void assessments.

Rehearing of case reported in 96 Neb. 619. *Former opinion modified.*

ROSE, J.

The suit was brought to cancel bonds issued by the Alfalfa Irrigation District and to enjoin the collection of

irrigation taxes levied on property therein. The district court sustained the bonds, but denied plaintiff relief as to the taxes. The judgment below was affirmed. *Orcutt v. McGinley,* 96 Neb. 619. This is a motion by plaintiff to modify the affirmance to the extent of enjoining the collection of the irrigation taxes levied during the years 1896 to 1908, inclusive. It is stipulated that the taxes for the year 1896 are invalid. On the face of the record the assessments for the other years mentioned are void because the taxing officers in making them disregarded mandatory provisions of the statute.

It is argued that plaintiff is not entitled to relief from the assessments because he did not offer to pay what is equitably due from him as a tax debtor. Where assessments are wholly void and the owner of taxable property has no means of ascertaining what amount may be lawfully levied, he is not required to make a tender as a condition of obtaining equitable relief. *Hutchinson v. City of Omaha,* 52 Neb. 345; *Harmon v. City of Omaha,* 53 Neb. 164; *Sioux City Bridge Co. v. Dakota County,* 61 Neb. 75; *Schneider v. Plum,* 86 Neb. 129.

In oral argument it was suggested that an injunction should not be granted for the reason that some of the owners of land in the irrigation district had paid the void assessments. This, however, will not prevent the granting of equitable relief to those who resist unpaid void assessments. The motion is sustained. The decree of the district court is reversed to the extent of canceling the void taxes and granting an injunction to prevent the collection thereof. In other respects the judgment is affirmed.

MODIFIED AND AFFIRMED.

GEARHART & BENSON, APPELLEES, V. FRENCHMAN VALLEY IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,697.

Waters: IRRIGATION: APPROPRIATION: VESTED RIGHTS. A completed appropriation of water for power under the law of 1877 is a vested right, of which subsequent appropriators for irrigating purposes are bound to take notice, and the priority, if unchallenged, is not lost by failure to demand an adjudication under the law of 1895. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District*, *ante*, p. 139, followed.

APPEAL from the State Board of Irrigation, Highways and Drainage. *Affirmed.*

W. S. Morlan, C. E. Eldred and *J. F. Cordeal,* for appellants.

Flansburg & Flansburg and *G. C. Proud, contra.*

ROSE, J.

This is an application to the state board of irrigation for the adjudication of a water right. Gearhart and Benson, plaintiffs, claimed the right to divert from the Republican river 200 cubic feet of water a second for the purpose of operating a flour-mill near Arapahoe. Their claim was resisted by defendants, who are upper appropriators of water for irrigation. The work of constructing the plant owned by plaintiffs was begun July 24, 1879. It was completed December 31, 1879. Since that time the right thus acquired has been continuously exercised. Separate, adjudicated appropriations of defendants date from 1890 to 1912. The state board of irrigation decreed that plaintiffs acquired the right to divert for power at the headgate of their millrace 195 cubic feet of water a second, and that the appropriation dates from July 24, 1879. Defendants have appealed.

It is argued by defendants that plaintiffs have no valid appropriation, because they did not give notice of their

claim or present it to the state board of irrigation for adjudication until June 10, 1912; that the doctrine known as "balance of convenience" should be applied, because the use of water for irrigation is more important than its use for power; that the claim of plaintiffs should have been rejected, because they allowed defendants, without notice or objection, to expend $300,000 in improvements for the purpose of using for irrigation waters of the Republican river and its tributaries. On the record in the present case, there being no dispute about the controlling facts, these propositions are questions of law which were recently decided adversely to defendants in the case of *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District, ante,* p. 139. It is unnecessary to restate the rules of law announced in the case cited or the reasons for the conclusions reached. The findings of the state board of irrigation are proper deductions from the evidence, and the decree correctly applies the law.

It was asserted in argument below that defendants had acquired prescriptive rights superior to the claim of plaintiffs, but this question is not adjudicated.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JAMES C. JOHNSON, APPELLEE, V. SCHMOLLER & MUELLER PIANO COMPANY, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,964.

Trial: INSTRUCTIONS. Record examined and found not to contain any prejudicial error.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John M. Macfarland, for appellant.

Weaver & Giller, contra.

FAWCETT, J.

Plaintiff brought this action in the district court for Douglas county to recover $3,457.47, alleged to be due him as commissions earned in the sale of pianos for defendant under two contracts covering the years 1911 and 1912. Defendant denies that there is anything due plaintiff under the contract, for the reason, as stated in its brief, that "the repossessions of pianos and the amount charged back thereunder against the appellee would offset, at the time of the trial, a large portion of the commissions, and that the contracts really contemplated that the appellant should retain sufficient of the commissions in its hands to offset future charges for repossessions under the contracts until the business between appellant and appellee was finally closed." There was a verdict and judgment for plaintiff for $2,512.62, and defendant appeals.

The court instructed the jury that the questions to be considered had narrowed down to a single issue; that one of the defenses pleaded by defendant was a set-off amounting to $305.40, which plaintiff claimed on account of repossessions of certain pianos which plaintiff had sold during the year 1910. By instruction No. 2 the court told the jury: "The burden of proof is upon the defendant to establish by a preponderance of the testimony that the terms of the contract were as it claims, and as above set forth. And, if the defendant has so established this fact, then under the testimony in this case the plaintiff is entitled to a verdict at your hands for $2,512.62. If the defendant has not established that the contract for 1910 was as it claims with respect to charging back the commissions as above set forth, then the plaintiff is entitled to a verdict for $2,818.02." After being out for about 24 hours without reaching an agreement, the jury were brought into court and interrogated as to the probability of their arriving at a verdict. The foreman and several members of the jury stated that they did not think it would be possible for them to agree. The court then called the attorneys before it, and, after some conference with them, counsel for plaintiff stated that, rather than have a disagreement, he would be

willing that the jury should return a verdict in favor of the plaintiff for the lesser sum, and that the court might so inform the jury; whereupon the court said: "Gentlemen of the jury, I am authorized to say to you by Mr. Weaver, attorney for the plaintiff, that, rather than have a disagreement in the case which would result in a retrial of this case at considerable expense to the county and the parties, the plaintiff would much prefer that you would find in favor of the plaintiff for the lesser sum, thus allowing the set-off for the amount claimed under the 1910 contract. With this statement on the court's part I will ask you to retire and further consider the case." Thereupon, the jury retired, and, after further deliberation, returned a verdict for the plaintiff for the sum stated. No error is assigned in defendant's brief as to what took place when the jury were called in, or as to the giving of the supplemental instruction which was given by the court at that time; but it is contended that the court erred in giving instructions 1 and 2 in the first instance. We are unable to discover any error in the giving of these two instructions. They were fully warranted by the pleadings and the evidence in the case. The evidence was conflicting, but was sufficient to sustain the verdict. This being true, we find no error in the record.

AFFIRMED.

MORRISSEY, C. J., BARNES and SEDGWICK, JJ., not sitting.

NIKOLA P. JERICH, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,971.

1. **Evidence:** PREPONDERANCE. "The preponderance of evidence is not determined alone by the greater number of witnesses who testify in favor of a party." *New Hampshire Savings Bank v. Dillrance*, 63 Neb. 412.

2. **Master and Servant:** INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE. The evidence examined and set out in the opinion *held* sufficient to sustain the verdict.

3. **Trial:** MISCONDUCT OF COUNSEL. The record examined and discussed in the opinion *held* insufficient to show misconduct on the part of counsel for plaintiff.

4. **Evidence:** PREPONDERANCE: INSTRUCTIONS. Instruction No. 12, set out in the opinion, examined and *held* properly given.

5. ———: EVIDENCE AT FORMER TRIAL: ADMISSIBILITY. Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause between the same parties is admissible if otherwise unobjectionable.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Edson Rich, John A. Sheean, A. G. Ellick and *B. W. Scandrett,* for appellant.

Smyth, Smith & Schall, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for personal injuries, defendant appeals.

On the day plaintiff received his injury he and a fellow workman were engaged in removing rivets from the boiler of a locomotive engine belonging to defendant, which was in defendant's shop for repair. At the same time two other employees of defendant were engaged in the same kind of work on the other side of the boiler. The two latter employees were using what is termed an "air gun" in their work. In order to remove the rivets one employee would hold a hammer over the head of a rivet and his associate would strike it with a sledge hammer, thus breaking or cutting off the head. It could then be driven out with a backing-out punch and sledge. When the air gun was used in connection with this work it was used in lieu of the backing-out punch and sledge. This air gun weighs about 25 pounds and consists of a plunger, a die and backing-out punch and the hammer itself. It is operated by com-

pressed air, which is conveyed to it through a long rubber hose, which can be attached to iron pipes that are located throughout the building, and which serve generally to convey the air through the shops from the machinery where it is generated. When the machinery is in operation there is a continuous supply of air running through the pipes, and it can be made to flow through the rubber hose or shut off again by the turning of an angle cock at the point of connection with the iron pipe. On the upper side of the heel of the hammer is a trigger which controls the immediate application of the air when connection between the iron pipes and the rubber hose is open. When the air is thus applied the plunger, which is a smooth, polished piece of steel several inches long, moves back and forth inside the hammer, like a piston, at a great rate of speed, striking the die when the air is on in full force at the rate of 700 or 800 strokes a minute and with a pressure of about 120 pounds to the square inch. The force thus applied to a rusty rivet soon loosens it and drives it out. The substance of plaintiff's testimony as to the manner in which he received his injury is that, after he and his partner, Hutchinson, had broken off the heads of a number of the rivets with the sledge and hammer, Hutchinson left him, for some purpose not disclosed, when he continued alone the work of driving them out; that one of the rivets stuck; that he stooped down so as to get a look at the other end of it, for the purpose of ascertaining the nature of the trouble. The boiler was resting upon wooden blocks from 18 to 24 inches in thickness, so that a person stooping down could look under the boiler across to the other side of it. Plaintiff testified that when he stooped down he saw the air gun on the other side of the boiler; that the hose to which it was attached was coiled and the gun was lying on top of the coil, pointing towards him; that as he looked the gun "went off" and the plunger left the gun and struck him in the eye, the result of which was the complete loss of the eye. The negligence charged is the act of leaving the gun lying idle, without removing the

plunger or shutting off the air. Just how the discharge of the gun was brought about is not shown.

The first assignment of error, and the principal one urged, is that the verdict is not sustained by the evidence. Plaintiff testified unqualifiedly that he had not had the gun in his hands nor used it on that day, but that the accident occurred as above outlined; while four witnesses testified for the defendant that plaintiff, prior to receiving the injury, had been using the gun on his side of the boiler. That there is a preponderance of witnesses in favor of the defendant on this material point is clear, and by reason chiefly of that fact it is urged that the great preponderance of the evidence is with the defendant and against the plaintiff. On this point the court, by instruction No. 9, told the jury: "If you believe from the testimony that the air gun had been taken by the plaintiff and was being used by him at the time he received his injury, then under the pleadings as set forth by plaintiff he cannot recover herein and you should find for the defendant." It is urged that the clear weight of the testimony shows that the verdict was contrary to this instruction. No witness claims to have seen plaintiff at the immediate time of the accident. They heard his outcry, and some of the employees, including Hutchinson, rushed to his assistance. Every witness who testified for defendant in relation to matters material to the case was, at the time of testifying, an employee of the defendant, unless we except Hutchinson. Hutchinson's testimony shows that he came from Virginia to Omaha shortly prior to the accident, which was in August, 1910, and worked for defendant until December 18 of that year, when he returned to Virginia; that he came to Omaha again when sent for by the claim agent of defendant, for the purpose of testifying in the case; that he returned to Omaha April 28, and from then until the time of the trial (in December) he had remained in Omaha at his own expense; that the railroad company furnished him a ticket to come to Omaha, but had not paid him anything else for coming and had made "no agreement at all" to give him anything. In *New Hampshire Savings Bank v. Dillrance,*

63 Neb. 412, Norval, C. J., tersely stated the rule thus: "The preponderance of evidence is not determined alone by the greater number of witnesses who testify in favor of a party." That has been the rule of this court from our earliest decisions to the present time, and has been many times announced and followed. We have followed that rule and refused to reverse cases many times when, if we had been the triers of fact, we might possibly have found contrary to the finding of the jury. As against this rule defendant cites *Garfield v. Hodges & Baldwin,* 90 Neb. 122, *Tyler v. Hoover,* 92 Neb. 221, and other cases, in support of the rule that, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake or other means not apparent in the record, it will be set aside. Both rules are well established in this state, but in the cases where the rule invoked by defendant was applied, it will be found that there were facts and circumstances appearing in the record which so corroborated the testimony of the witnesses of the defeated party in the court below as to make it clear that the jury had not only discredited the witnesses on the one side, but had also disregarded the established facts and circumstances in evidence outside of the testimony of such witnesses, thus indicating that their verdict must have been found through passion, prejudice, mistake or some means not apparent in the record. In the present action there are no established facts and circumstances corroborating the witnesses of the defendant, the existence of which does not depend upon the oral testimony of such witnesses. After careful examination of the testimony, we cannot say that the jury were not warranted in believing the testimony of the plaintiff and discrediting that of the witnesses by whom it was sought to contradict him. We are compelled, therefore, to hold that there is sufficient evidence to sustain the verdict, and uphold the action of the jury sustained by an experienced trial court, all of whom saw the witnesses upon the stand, heard them give their testimony, and observed their demeanor while giving it.

The second assignment is misconduct on the part of counsel for plaintiff during the cross-examination of some of defendant's witnesses. It appears that plaintiff was at one time prosecuting an action in the federal court against defendant, upon the same cause of action involved here, which action was dismissed and the present action instituted. On the trial in that court it appears that defendant introduced as a witness Roscoe Grachiro, the employee who had been assisting Scarpello in using the air gun on the morning of and prior to the accident. Grachiro was in the courtroom throughout the present trial, and counsel for plaintiff, seeing that defendant was not going to offer him as a witness, for the possible reason, as counsel urges, that his testimony in the federal court was favorable to plaintiff, attempted to prove by the stenographer who reported the trial in the federal court Grachiro's testimony at that trial. Strenuous objection was made and sustained by the court. Plaintiff made several attempts by this witness to get before the jury Grachiro's testimony at that time. Counsel for defendant finally insisted that counsel should make his offer of proof to the reporter in the regular way. Thereupon the court ruled: "If you want to repeat any more, make the offer so that the jury cannot hear the questions and answers." When counsel made a similar attempt by a second witness, the tilt between counsel for the respective parties became somewhat animated. Judging from the record, we would say that it was a case of "give and take" between them. The trial court finally put an end to the matter in this apt language addressed to counsel for plaintiff: "I think you are within my rule yet, but you are right on the precipice and you ought to stop where you are. You know when you are on the danger line." We think the court outlined the situation very accurately in those words. Upon this admonition being given, counsel for plaintiff abandoned his attempt. We do not think the record shows any reversible error on this point.

The third assignment in the brief complains of instruction No. 12, given by the court on its own motion. By this instruction, the court told the jury: "By a preponder-

ance of the evidence is meant not necessarily the greater number of witnesses, but that amount of evidence which, taken on the whole, produces the stronger impression upon the minds of the jury and convinces you of its truth when weighed against the evidence in opposition thereto." It is conceded that this instruction states the law without question as applied to a normal situation, but it is insisted that in a case of this kind, where defendant introduced a large number of witnesses to sustain its position, and the plaintiff introduced but one, the natural effect of the instruction was to mislead the jury into believing that there was doubt about the credibility of the larger number of witnesess, and that the instruction in this case had the effect of accentuating this particular point. Counsel then state what, in their judgment, the jury should have been told under the situation presented, but they do not call our attention to any instruction of that kind as having been tendered by them and refused. We think the instruction was properly given.

The fourth assignment is that the court erred in permitting the reporter to read the testimony of a witness that had been taken at the former trial of the case in the federal court. This was the testimony of Doctor Owen, the oculist who treated plaintiff after his injury. When the offer was made, defendant admitted in the record "that Doctor Owen is out of the state and is now in the state of California," but objected on the ground that no sufficient foundation had been laid for the reading of his testimony. Counsel further stated that he did not object on the ground that the testimony was not exactly as given by Doctor Owen on the former trial, "where the parties were the same and where the subject matter and issues were the same, and where the doctor had been duly sworn under the forms of law," but based his objection "wholly on the ground that no sufficient showing is made as to why his deposition was not taken." The court did not err in permitting the testimony to be read. *City of Ord v. Nash,* 50 Neb. 335, where the rule is announced: "Where a witness is shown to be absent from the state, his testimony given at a former

trial of the same cause is admissible if otherwise unobjectionable." There were peculiar circumstances appearing in *Wittenberg v. Mollyneaux*, 59 Neb. 203, cited by defendant in support of its assignment of error, which show an exception to the rule above announced.

Some other minor points are discussed in brief of counsel, but everything necessary to a determination of the case is covered by the four formal assignments which we have considered. The only question in the case which has given us any trouble is that presented by the first assignment, viz., the sufficiency of the evidence. While we could easily have affirmed a judgment the other way upon the record before us, we feel that the facts will not warrant us in substituting our judgment for that of the trial court and jury in determining the important question—the credibility of the witnesses.

The judgment of the district court is therefore

AFFIRMED.

MORRISSEY, C. J., BARNES and HAMER, JJ., not sitting.

G. ROBERT HEWSON ET AL., APPELLEES, V. ROYAL HIGHLANDERS, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,980.

Insurance: FRATERNAL INSURANCE: SUICIDE CLAUSE. A provision against liability in case of death by suicide, contained in the application and certificate of membership in a fraternal beneficiary association, though not expressly authorized by its by-laws, is a binding part of the contract of insurance, if not in violation of the articles of organization of the association or of the statute under which it is organized.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed with directions.*

Hainer & Craft, for appellant.

George W. Berge, contra.

FAWCETT, J.

On February 12, 1906, C. Clarence Hewson became a member of defendant association, and obtained from defendant a certificate of membership, designated in the petition as a policy of insurance, for $2,000, in which certificate the plaintiffs, who are minors and bring this action by their next friend, were named as beneficiaries. On April 23, 1911, Mr. Hewson died by his own hand. That he committed suicide is conceded. The defendant denied liability for the $2,000 death claim, and offered to pay to the beneficiaries an amount equal to the sum which the decedent had contributed to the fidelity fund of the association, which aggregated $51.20. The offer was declined by plaintiffs, and this action was commenced in the district court for Lancaster county. At the conclusion of the evidence plaintiffs moved for a directed verdict in their favor for the principal sum named in the certificate, and interest. The defendant moved for a peremptory instruction to the jury to return a verdict in favor of the plaintiffs for the sum of $51.20. The motion of defendant was overruled and that of plaintiffs sustained. In accordance with the direction of the court the jury returned a verdict in favor of the plaintiffs for $2,210, upon which judgment was entered, and defendant appeals.

The briefs on both sides concede that there is no issue of fact presented by the record and that it is for the court to determine the rights of the parties. The decedent's application for membership in defendant association was a partly written and partly printed application. The original is before us. It bears date January 18, 1906. The original certificate of membership is also before us. It bears date February 21, 1906. The application contains this agreement: "I also agree that should I commit suicide after my admission into the Fraternity, whether sane or insane, that this contract shall be null and void and of no binding force upon said executive castle; except that I agree that all payments made by me which have been

placed in the fidelity fund shall be accepted in full payment of all benefits to my beneficiary or beneficiaries, and that payment of same by the Royal Highlanders shall cancel all claims whatsoever." The evidence shows that the application correctly sets out the answers given by the decedent, and that he knew the contents of the application which he was signing. The benefit certificate recites: "That in case of the suicide of the member, either sane or insane, the amount of all contributions of the member to the fidelity fund of the fraternity only shall be paid to the beneficiary named in this certificate. * * * Both the edicts and application are made a part of this certificate."

We start out with the fact, alleged in the petition and admitted in the answer, that at all of the times in controversy defendant was a fraternal beneficiary association, organized and existing under and by virtue of the laws of this state, and doing business as such. This being true, defendant was authorized to enter into lawful contracts of membership with applicants applying therefor. At the time the decedent applied for admission to membership and received his benefit certificate the defendant had a complete set of published edicts, commonly designated in other societies as by-laws. Prior to 1901 the edicts were silent on the subject of suicide. In that year the executive castle amended them so as to provide exemption from liability in such cases. This exemption was retained in the amendment of 1905. The application and certificate were prepared in accordance with the edicts as thus amended, and, so far as the evidence shows, were thereafter exclusively used in admitting new members. Plaintiffs insist that in a fraternal society the certificate is not the contract; that the constitution of the society, its by-laws and the certificate constitute the contract. They also contend that the edicts of 1901 and 1905 were not legally adopted, and cite *Lange v. Royal Highlanders,* 75 Neb. 188, and *Briggs v. Royal Highlanders,* 84 Neb. 834, in support of their contention. It is true that in those cases we held that in adopting the edicts of 1901 and 1905 the

executive castle which adopted them was not a representative body, and as so constituted the defendant did not have a representative form of government, and for that reason we held that the edicts then adopted could not be invoked to defeat a recovery by the beneficiaries of one who had committed suicide, under a certificate issued prior to the abortive attempt to change the edicts of the society; but we did not hold in either of those cases that the association was not legally transacting business. On the contrary, in the *Lange* case on rehearing, 75 Neb. 199, we said: "It must be conceded that the defendant, by filing its articles of incorporation in compliance with the law in force at the time of its organization, acquired the right to carry on the business for which it was created." Nor did we hold in either of those cases that if the case then under consideration had been based upon a certificate which itself recited that the defendant should not be liable in the event of suicide, and the application upon which the certificate was issued also expressly stipulated that there should be no liability in case of suicide, the defendant would have been liable notwithstanding such stipulations. On the contrary, in the *Briggs* case, p. 841, in the concluding sentence of the opinion we said: "There being nothing in the certificate of membership issued to the assured, or in the edicts and by-laws of the defendant as they existed at the time he was admitted into membership and received his certificate, which exempted the defendant from liability in the event of suicide, we must hold that the judgment of the distric court was right"—and affirmed the judgment which had been entered in favor of the plaintiff.

As we have said, the edicts in force prior to the amendments of 1901 and 1905 were silent on the subject of suicide; and if the certificate issued to Mr. Hewson had also been silent on that subject, then under the authority of the *Lange* and *Briggs* cases the defendant would be liable. But here the benefit certificate itself, as well as the application upon which it was based, both expressly provided that in the event of suicide the defendant should not be liable. The question, therefore, to be decided is, could the

defendant make such a contract with applicants for membership? There is nothing in the statute which forbids the making of such a contract, nor is there anything in the edicts as they existed prior to the amendment of 1901 which forbids it. The contract is a reasonable one—one in the interest of the membership of the association. And if the defendant, in the regular course of its business, concluded that it would not longer continue to assume the risk of suicide, and inserted in the application to be signed by all persons subsequently applying for membership, and in all of its benefit certificates to be subsequently issued, an express agreement that the defendant should not be liable for death by suicide, we are unable to see any just theory upon which it should be held that such a contract is not lawful and entitled to be enforced as made. An applicant for membership knows when he signs his application that that is an important condition of his admission into the society. If he voluntarily signs the application and therein agrees to such condition and accepts the benefit certificate issued thereon and containing the same condition, we must enforce the contract as made. To do otherwise would be to make a new contract for the parties and give to the applicant, for the benefit of his beneficiaries, a contract which the association itself would not have entered into. This we must decline to do. *McCoy v. Northwestern Mutual Relief Ass'n,* 92 Wis. 577, is squarely in point, and cites numerous cases in its support. Taking the certificate and the application together, it is clear that the defendant never in any manner agreed to pay for the death of Mr. Hewson if caused by his own hand. Its only agreement with him, in the event of suicide, was to pay to the beneficiaries named in the certificate the money which, at the time of his death, the decedent had contributed to the fidelity fund of the association. This amount it offered to pay, and its motion at the close of the trial, to direct a verdict for the plaintiffs for that amount, should have been sustained.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judg-

ment in favor of the plaintiffs, in accordance with the terms of defendant's motion entered at the close of the former trial.

REVERSED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissents.

KEARNEY WATER & ELECTRIC POWERS COMPANY, APPELLEE, v. ALFALFA IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,355.

OPINION on motion to modify former judgment herein reported *ante*, p. 139. *Former judgment of affirmance modified.*

SEDGWICK, J.

Within the time allowed for an application for rehearing, a motion was filed by plaintiff to modify the judgment of this court and the decision of the state board, so as to fix the date of the plaintiff's appropriation September 10, 1882, instead of September 1, 1886. Notice of this application was given to all parties interested, with leave to file briefs upon the question if desired. Upon further examination of the record, we are satisfied that an error has been made in this regard. The state board found "that the work of excavating and constructing the canal was begun on the 10th day of September, 1882, * * * and the canal completed as reconstructed by June 1, 1886." Under the law, as at the time existed, the date of the appropriation was the date of the commencement of the work which was afterwards completed and the water thereby applied to a beneficial use. The priority of the plaintiff's appropriation is therefore September 10, 1882, and our former judgment and the order of the state board are modified accordingly.

FORMER JUDGMENT MODIFIED.

IN RE ESTATE OF WILLIAM W. WILSON.

STEPHEN E. COZAD, ADMINISTRATOR, ET AL., APPELLANTS, V. CORA M. HIBNER, EXECUTRIX, APPELLEE.

FILED FEBRUARY 26, 1915. No. 18,830.

1. **Executors and Administrators:** ACCOUNTING: INTERLOCUTORY ORDERS. Orders of the probate court adjusting or correcting accounts of an administrator, made while he is acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge.

2. ———: ———: APPEAL: JURISDICTION. Upon appeal to the district court from an order of the county court adjusting or correcting the accounts of an administrator, the district court has jurisdiction of the matters tried in the county court from which the appeal is taken.

3. ———: ———: ———: ———. When objection is made in the county court to certain specified items in the accounts of an administrator and trial is had in that court as to those items only, appeal to the district court from the decision thereon will give the district court jurisdiction only of the matters tried and appealed from.

4. ———: ———: ———: TRIAL BY COURT. Upon a former appeal of these parties it was determined by this court that objections to the report of an administrator should, upon appeal to the district court, be tried by the court, and not by a jury.

5. **County Courts:** JURISDICTION: EQUITY POWERS. The county court has exclusive original jurisdiction of the estate of deceased persons. In exercising that jurisdiction it may incidentally determine equitable questions, but the county court has no general equitable jurisdiction.

6. **Executors and Administrators:** ACCOUNTING: OBJECTIONS. Upon appeal from the county court from an order correcting the accounts of an administrator, a pleading styled a "petition in equity," filed in behalf of the estate, alleging grounds for disallowing items of credit and for additional debits in the administrator's report must be treated as objections to his report.

7. ———: ———: INTEREST. When an administrator in his report to the county court obtains an order allowing him credit for a certain sum of money as paid out by him in behalf of the estate, which sum he has not paid out, but thereafter retains for his

own use for several years, he may properly, in the discretion of the court, be charged with interest on such sum from the time that he obtained possession thereof as his own money and while he so retains it.

8. ———: ———: ———. An administrator is not chargeable with interest on money which he holds as administrator subject to the order of the court, unless he received interest thereon, or the circumstances are such that he might and ought to have received such interest. He cannot be allowed interest on money paid out by him for the estate while he holds a general balance in his hands.

9. ———: ———: ATTORNEY'S FEES. An administrator is not entitled to charge against the estate attorney's fees and other expenses incurred by him in the contest with the heirs of the estate as to his alleged misappropriation of the funds of the estate.

10. ———: ———: COSTS. In such a contest, if there has been litigation between the administrator and the heirs of the estate and final judgment determining the liability for costs thereon, the administrator in his final settlement with the estate should be allowed such costs as are adjudged in his favor in such litigation, but not costs adjudged against him therein.

11. ———: ———: COST OF BOND. An administrator is entitled to credit for the cost of procuring and continuing his bond as administrator furnished by a bonding company under sec. 1500, Rev. St. 1913.

12. ———: ———: APPEAL: DISPOSITION OF CAUSE. When the county court has made a finding and order as to the heirs and the proportion of the estate to which each is entitled, and afterwards there is an appeal to the district court from an order correcting the accounts of the administrator, the district court, after determining the debits and credits of the administrator, should remand the cause to the county court for settlement of subsequent costs and expenses and for final distribution.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed as modified.*

Robert Ryan and *Mockett & Peterson,* for appellants.

Tibbets, Anderson & Baylor and *Claude S. Wilson, contra.*

SEDGWICK, J.

William W. Wilson died in 1901, and George E. Hibner was appointed administrator of his estate by the county

court of Lancaster county. In 1906 Hibner filed a report of his doings as administrator, and asked for an order approving his report and for his final discharge. Objections were filed, and on the 26th day of June, 1906, the court made an order upon the report and the objections. In this order the court fixed the compensation of the administrator for all services rendered by him, including services which he had rendered as special administrator, in the sum of $2,000. From this allowance of $2,000 the administrator appealed to the district court, and upon hearing in that court the order was made allowing a larger amount for his services, instead of the $2,000 allowed by the county court. From this judgment of the district court the heirs appealed to this court, and the judgment of the district court was reversed, because of the improper allowance of certain items. *In re Estate of Wilson,* 83 Neb. 252. Upon another trial in the district court $3,500 was allowed the administrator for his services, instead of the $2,000 formerly allowed by the county court, and upon appeal to this court the judgment was affirmed. 86 Neb. 175.

After the mandate of this court affirming that judgment had been filed in the district court, the heirs of Wilson filed in the county court a petition, alleging that in the former report of Mr. Hibner as administrator he had obtained a credit of $4,500, to which he was not entitled, as money paid out by him to one Evans in the settlement of Evans' claim that he was heir to the estate. It was alleged that in fact he had not paid out this amount, but still had it in his hands. It was also alleged that the administrator had a false credit of $23.25 in his report for expenses in relation to that matter. The heirs appear to have treated this as an equitable proceeding to modify the former order of the court upon the administrator's report, and they asked leave to file separate petitions. This leave was granted, and separate petitions were filed by each of the heirs, asking the county court to allow each of them such part of the $4,500 as it was claimed he was entitled to. Upon hearing in the county court, that court found that the allegations of the heirs were true; that the $4,500 ought to be distributed

among the heirs. From this order of the county court the administrator appealed to the district court in January, 1911. In February, 1911, the administrator filed in the county court a supplemental report showing receipts and disbursements for the period subsequent to the order of the county court upon the former report. Objections were filed to this supplemental report, and a hearing was had and an order made thereon, from which an appeal was taken to the district court. In the district court it was ordered that these two matters should be tried together. In the meantime Mr. Hibner died, and Stephen E. Cozad was appointed as administrator in his place. The new administrator filed in the district court a petition styled a petition in equity, setting out substantially the same matters as were alleged in the petitions of the heirs that had been filed in the county court, and alleging some other matters also. Upon trial in the district court, that court found that the reports of Mr. Hibner as administrator were right, and they were approved in all particulars, except in two specified particulars. From this order of the district court both parties have appealed to this court.

The parties in the briefs discuss questions of jurisdiction and innumerable other questions which it will be impossible to review here separately.

It will be observed that the controversy relates entirely to the accounts of the administrator and is between the administrator and the estate. We have observed no final order of the court discharging the administrator, and while he was serving as administrator orders of the court upon his accounts as such administrator were interlocutory only, and not final orders. *Bachelor v. Schmela,* 49 Neb. 37. The county court, therefore, had complete jurisdiction over the accounts of the administrator until his final discharge.

Upon an appeal to the district court that court would have jurisdiction of the matter tried in the county court from which the appeal was taken. In the proceedings begun by the heirs in the county court to modify the report of the administrator of 1906, the application of the heirs was specific and related to only two items of the report,

as above stated. Upon appeal from that order, therefore, the only question presented was as to those two items. When the administrator filed his supplemental report in February, 1911, that report purported to present his doings as administrator and his debits and credits subsequent to the former order of the county court. Objections were made to this report by the heirs, but there was no attempt to review any of the proceedings of the administrator except those contained in the supplemental report. The county court made an order upon the matters set forth in the supplemental report, and an appeal was taken to the district court. This appeal, therefore, would remove to the district court all of the matters involved in the supplemental report and the objections thereto.

It was determined upon the first appeal to this court from the allowance made to the administrator that the matter should have been tried by the court itself, and not by a jury. 83 Neb. 252. Such matters are, in the first instance, determined in the county court without a jury, and if appealed to the district court are to be determined in the same manner. The county court has exclusive original jurisdiction of the estates of deceased persons. In exercising that jurisdiction it may incidentally determine equitable questions, but the county court has no general equitable jurisdiction. An appeal, therefore, from the county court to the district court gives that court no general equitable jurisdiction. This was a proceeding in probate to correct the account of the administrator. The petitions filed and styled petitions in equity should therefore be treated as objections to the account of the administrator.

The administrator had not paid out the $4,500 for which he had been credited. The money was still in his hands, and there was no claim pending against the estate therefor. The district court, therefore, did right in charging his account with that amount. The district court also charged him with interest thereon from the time that he improperly obtained credit in the county court therefor, and this interest was also a proper charge. The court

refused to charge him with interest prior to the time that he obtained the improper credit, and this order was correct, because it does not appear in the record, so far as we have observed, that the administrator received any interest on the money prior to that time or could reasonably have received such interest. Upon the first appeal to this court, above referred to, it was determined that the administrator is entitled to compensation for services rendered the estate, and in a proper case may employ attorneys, but he is not entitled to reimbursements for attorney's fees or other expenditures incurred by him in his individual contest with the estate. The item of $23.25 expense is not, so far as we have observed, shown to have been improperly allowed.

Objection is made to the allowance of various items in the supplemental report filed in the county court in February, 1911. There were items in that report for expenses of continuing his bond as administrator which were paid by the administrator to a bonding company. All of these items were subsequent to the act of 1905, and were proper charges under that act. Rev. St. 1913, sec. 1500. Prior items of a similar nature were adjusted in the order of 1906, and were not included in the objections made to that adjustment. The district court, therefore, had no jurisdiction to review those items.

In the supplemental report of 1911, which was duly appealed from, the court allowed the administrator fees for attorneys employed by him in the contest between himself and the estate as to the settlement of his account and in the various appeals therefrom to the district and this court. Under the former holding of this court in the appeal referred to, these items were improperly allowed. The fees appear to be reasonable and just, but they were incurred by the administrator, not for the benefit of the estate, but in the contest against the estate, and such fees are chargeable to the administrator himself. These fees and costs paid by his attorneys as allowed by the county court amounted to $932.25. There is one item for services

in making first settlement in county court which is not shown to be improperly allowed, amounting to $100. The remainder of these items should be charged to the administrator. The district court allowed the administrator on account of these fees $532.25 and interest thereon, amounting at the date of the decree to $611.72. Interest is not charged against the administrator on his general account, but only on the item of $4,500 from the time that he converted that amount to his own use by improperly taking credit therefor in his report. No interest, therefore, should be allowed him on his credits. There should therefore be charged to his account the further sum of $511.72 on account of the attorney's fees and costs improperly allowed.

The district court also allowed the administrator three items of court costs and expenses in the district court and this court in that litigation, which are objected to by the heirs, as follows: Printing brief $14.50; taking Evans' deposition $16.36; attorney's fees in Evans case $20; and the following items of costs improperly allowed to the attorney of the administrator: Commencement fee district court $5; filing fee 75 cents; transcript for appeal to district court $23.25; filing fee district court second appeal $3.25. The right to these costs was of course adjudicated in those actions themselves, and he should be allowed credit only for those costs that were taxed in his favor. Objection is also made to the allowance of compensation to the administrator for his services during the time covered by the supplemental report, but it was determined upon the appeal referred to that the administrator is entitled to such compensation. The trial court found that there was no such wilful malfeasance on the part of the administrator as would forfeit his rights as administrator, and, so far as we have observed, this finding is supported by the evidence.

It is objected that the district court should have determined all of the rights of the various heirs and the amount to which each is entitled, but we think that in this the trial court did right. The county court in the original order made a finding as to the heirs and the proportion of

the estate to which each is entitled, and that order, so far as we have observed, is not appealed from and is not now seriously questioned. The matter presented to the district court upon appeal was as to the account of the administrator, and the district court, after having settled those items of account, ordered: "That distributions be made in the proportions shown in the court's decrees, except as settlements have been made and advancements made, so as to give to each heir the amount due as may be found by the court after payment of costs. That this decision be certified to the county court for such proceedings as may be necessary in accordance therewith." This was the proper disposition of the matter.

The judgment of the district court is therefore modified, so as to add to the charges against the administrator the amount of attorneys' fees improperly allowed, $511.72, and so as to direct the county court to adjust the court costs specified in this opinion in accordance with the final judgments rendered in the litigation in which those costs were incurred, allowing to the administrator credit for those items only that were taxed in his favor. Interest also will be charged against the administrator's account on the $4,500 to the date of the final order hereon in the county court, and on the whole balance due the estate from the administrator from the entry of such final order until the same is paid to the present administrator. As so modified, the judgment of the district court is affirmed. Each party will be taxed with his own costs in this court.

MODIFIED AND AFFIRMED.

MORRISSEY, C. J., BARNES and HAMER, JJ., not sitting.

EARNEST A. CALLING, APPELLEE, V. ARCHIE S. GILLAND, APPELLANT.

FILED FEBRUARY 26, 1915. No. 18,871.

County Commissioners: TERM OF OFFICE. Under the constitutional amendment of 1912 and the statute of 1913 (Rev. St. 1913, sec. 1955), a county commissioner, elected in 1912 in a county not under township organization and having three commissioners, holds his office for a term of four years, beginning in January, 1913, and his successor will hold for the remainder of the four-year term ending January, 1919.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

H. D. Rhea and *F. J. Byrd,* for appellant.

E. A. Cook and *W. A. Stewart, contra.*

SEDGWICK, J.

At the general election in the fall of 1912 the plaintiff was elected to the office of county commissioner for the third commissioner's district of the county of Dawson. Dawson county at that time was not under township organization and had three commissioners. Under the law as it then existed one county commissioner was elected each year for the term of three years. *Best v. Moorhead,* 96 Neb. 602; *Saling v. Bahensky,* p. 789 *post.* The term, therefore, for which the plaintiff was elected would expire in January, 1916. The constitutional amendment of 1912 provided for biennial elections (Const. art. XVI, sec. 13), and the legislature of 1913 enacted a general statute for the purpose of harmonizing the statute then existing with the constitutional amendment. It repealed some of the former acts. It provided that, in counties not under township organization having three commissioners, "two commissioners shall be elected in the year 1914 and every fourth year thereafter, and one commissioner shall be elected in the year 1916 and every fourth year thereafter."

Rev. St. 1913, sec. 1955. Construed literally, this provision would have limited the plaintiff's term to two years, ending in January, 1915; that is, his successor would be elected at the general election in 1914; but the constitutional amendment referred to provided "that no office shall be vacated thereby, but the incumbent thereof shall hold over until his successor is duly elected and qualified." It was held in *Best v. Moorhead, supra,* that the statute requiring two commissioners to be elected in 1914 could not apply to an incumbent whose term of office would not expire until January, 1916. The plaintiff therefore is entitled to hold the office until January, 1917, which is two years of the term of his successor, which term expires in January, 1919.

This is the only question presented and discussed in the briefs, and the trial court having held in accordance with the views above expressed, its judgment is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ROBERT SALING, APPELLANT, V. K. D. BAHENSKY, COUNTY CLERK, APPELLEE.

FILED FEBRUARY 26, 1915. No. 18,933.

1. **County Commissioners:** TERM OF OFFICE. Section 55 of the act of 1879 (laws 1879, p. 353), "Concerning counties and county officers," as amended by chapter 46, laws 1905 (Rev. St. 1913, sec. 980), fixes the terms of county commissioners of all counties at four years.
2. **Counties:** OFFICERS: TERM OF OFFICE. Chapter 51, laws 1907, which amends a section of the general election law, provides that laws creating county offices shall control as to the election of county officers, and the provisions in regard to the terms of such officers do not apply when the statute creating the office fixes the term.
3. **Elections:** INJUNCTION: QUÆRE. Whether injunction is the proper remedy in any case to control the action of the county clerk in arranging the general election ballot, quære.

APPEAL from the district court for Howard county: JAMES N. PAUL and JAMES R. HANNA, JUDGES. *Affirmed.*

W. T. Thompson and *T. T. Bell,* for appellant.

Charles G. Ryan, R. R. Horth and *Charles Dobry, contra.*

Reese, Reese & Stout and *Hainer, Craft & Edgerton, amici curiæ.*

SEDGWICK, J.

At the primary election in 1914 the relator and Frank Bowers and William Johnson were nominated as candidates for the office of county commissioner for Howard county. Thereafter the relator began this action in the district court against the respondent, who is county clerk of that county, to restrain him from putting the names of Bowers and Johnson upon the official ballot as candidates for that office. The district court granted a preliminary restraining order and afterwards, upon final hearing, dissolved the restraining order and dismissed the proceedings, and the relator has appealed.

The relator was elected to the office of county commissioner at the general election in the fall of 1911, and contends that his term was for four years and would not expire until January, 1916, and therefore there was no vacancy in that office to be filled at the election of 1914.

1. It is objected that injunction is not an appropriate remedy in such case. Contest of election provided by statute or, when that remedy is not applicable, the writ of *quo warranto* is the proper method of trying the right to public office. If the name of one who has been regularly nominated to an office is kept from the ballot by a restraining order or a temporary injunction, he may be prevented from being a candidate at the election, although it is finally determined in the same case that he was entitled to a place on the ballot. Thus he may, by a preliminary order, without any hearing, be deprived of a right that can never be restored to him. If injunction is the proper remedy,

the decision must finally depend entirely upon the relator's right to the office. If the relator's term has not expired, the election of a successor will not necessarily deprive him of the office. The question can still be tested by *quo warranto* proceedings. In *Best v. Moorhead*, 96 Neb. 602, the relators claimed that their terms as county commissioners had not expired and, as in this case, they sought to restrain the county clerk from placing the names of rival candidates upon the ballot. The only difference between that case and the case at bar, so far as this point is concerned, is that it related to the primary ballot, and in the case at bar the election ballot is in question. They began in time so that the case was disposed of in this court before the primaries were held. The question whether injunction was the proper remedy was not pressed and was not considered. In the case at bar the respondent says in the brief that the contested names were placed on the ballot, and relator was also a candidate at the election, but was defeated. The case is therefore purely academic so far as the form of the ballot and the names appearing thereon are concerned; but there are other cases pending in this court involving the question of the length of terms of county commissioners in counties not under township organization and having three commissioners. In some of them at least the question is being properly contested by *quo warranto* and, as we consider that we are already committed upon the question of the length of these terms in *Best v. Moorhead, supra,* we have concluded to state some additional reasons for that decision.

2. It was suggested in *Best v. Moorhead, supra,* that "the statutes governing this question are conflicting and inconsistent and cannot be literally enforced." The legislature of 1879 enacted two statutes, one entitled "An act to provide a general election law, the procedure relative to contested elections, and the filling of vacancies in office" (laws 1879, p. 240), and the other entitled "Concerning counties and county officers" (laws 1879, p. 353). The act "Concerning counties and county officers" was a comprehensive statute of 154 sections. It provided that the

board of county commissioners shall consist of three persons (section 53), and that, "at the first election held to choose the board of commissioners under this act in any county, the person having the highest number of votes shall continue in office for three years; the next highest two years, and the next highest one year; * * * and each commissioner elected thereafter, in pursuance of the foregoing section, shall hold his office for three years, and until his successor is elected and qualified." Section 55. This section was intended to apply to all counties from the time that the act took effect, and not merely new counties organized after that, as suggested in the brief, since section 11 of the act specifically provides for the first election in new counties. This act was afterwards very frequently amended, for the purpose of providing for five commissioners instead of three in Douglas county and in such other counties as might elect to have that number, and for various other purposes, from the time of its first enactment until the legislature of 1905. In 1905 the legislature attempted to adopt the policy of biennial elections. It enacted a statute specifically for that purpose. Laws 1905, ch. 65. That statute was held to be unconstitutional, as the constitution expressly fixed the terms of many officers to begin in odd-numbered years, and that act undertook to change those same terms to begin on even-numbered years, and for other reasons. The legislature of 1905 (laws 1905, ch. 46) also enacted a statute, entitled "An act to amend sections 54 and 55, of art. I, ch. 18 of the Compiled Statutes," etc. These were sections 54 and 55 of the original act of 1879, "Concerning counties and county officers," as amended. Section 54 had been amended from time to time and finally in 1891 (laws 1891, ch. 21). Section 54 of the original act provided for dividing counties into three districts, and that one commissioner should be elected from each district, and section 55 fixed the terms of office of the commissioners. This section was as follows: "At the first election held to choose the board of commissioners under this act in any county, the person having the highest number of votes shall continue in office for three

years; the next highest two years, and the next highest one year; but if any two or more persons have the same number of votes, their term of office shall be determined by the board of canvassers, and each commissioner elected at the first general election, as herein provided, shall hold his office for three, two or one years, as the case may be, and until his successor is elected and qualified, and each commissioner elected thereafter, in pursuance of the foregoing section, shall hold his office for three years, and until his successor is elected and qualified." It was intended to apply to all counties of the state, and not merely counties thereafter organized. Section 11 of the act provided for the election of commissioners in new counties. Chapter 46, laws 1905, amended said section 55. The only change made was to make the term of office four years instead of three. It amended a section of the act "Concerning counties and county officers," and the manifest intention was to make the term four years in all counties of the state. The general election law provided that the provisions of an act creating an office should control as to the election of such officers and their terms of office. It was held in *Best v. Moorhead, supra,* that this amendment of the act concerning counties and county officers had the effect to fix the terms of county commissioners in all counties of the state.

The general election law of 1879 (laws 1879, p. 240) named the officers to be elected, state, district, county, township and precinct, and generally stated incidentally the term of office. Section 7, after providing for the election of various officers of counties not under township organization, contained these words: "And one county commissioner shall be elected annually who shall serve three years." This was all that was said in the act in regard to county commissioners and their terms of office. The act concerning counties and county offices created the office of county commissioner, and provided at large the duties of that office and the time and manner of the election. If there is a conflict between the general election law and the law concerning counties and county officers as to the

election of county commissioners the latter act would of course control, under the provision of the general election law above quoted, even if it would not control without such provision. A statute was enacted in 1907 (laws 1907, ch. 51) which purports to amend section 7 of the general election law and still retains the words: "One county commissioner shall be elected annually who shall serve three years"—which is the only reference to county commissioners, and it also contains the provision that county officers "created by statute or that may be hereinafter created shall be elected at such general election as may be provided in the law creating the office or offices." It repeals the former section 7 of the general election law, but does not repeal nor mention the act in relation to counties and county officers. The act was enacted after the general election law of 1905 was declared unconstitutional, and was intended to take the place of that statute, and did not intend nor purport to repeal or amend the act relating to counties and county officers, but expressly provided that that act should control as to the election of such officers. The statute of 1905, as we have already seen, makes the term of county commissioners four years, and in *Best v. Moorhead, supra,* it was held to be constitutional and valid for that purpose.

The relator's term of office was four years, beginning in January, 1912. Without determining whether the process of injunction may be used under any circumstances to control the action of the county clerk in making up the official ballot, we cannot find that there was any abuse of discretion in dismissing the action under the peculiar circumstances in this case.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

KATHERINE FERBER, APPELLANT, V. FRANK LEISE ET AL., APPELLEES.

FILED FEBRUARY 26, 1915. No. 17,836.

1. New Trial: RELIEF IN EQUITY. A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time.
2. ———: ———: PETITION. The allegations of the petition set forth in the opinion *held* to state a cause of action in equity for a new trial in order to preserve the right of appeal to this court. *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

R. J. Millard, J. F. Boyd, C. A. Kingsbury, Edward E. Baron and *Harding & Oliver,* for appellant.

Wilbur F. Bryant, B. Ready and *Flansburg & Flansburg, contra.*

HAMER, J.

This case was brought for the purpose of obtaining a new trial in a case of the same title, where the petition of the plaintiff was dismissed. The defendant objected to the introduction of any evidence upon the ground that the petition did not state facts sufficient to constitute a cause of action. The court sustained the objection, dismissed the case, and the plaintiff has appealed. The question therefore is solely one of sufficiency of the petition, which the objection admits to be true.

The petition alleged, in substance, that on November 13, 1911, there was tried in the district court for Cedar county, Nebraska, an action wherein the plaintiff herein was the plaintiff and the defendants herein were the defendants; that on said day the evidence was taken, the arguments of counsel made, the cause submitted to the court and taken under advisement to be decided at a future day

of said term; that at the time the case was submitted on November 13, 1911, counsel for plaintiff stated in open court, in the presence and hearing of the judge of the district court who was then presiding, that they could not be present at the time said case would come up for final decision, and requested the court, in case the decision was against the plaintiff, to fix the amount of the supersedeas bond, and to give the plaintiff 40 days in which to prepare and submit a bill of exceptions to opposing counsel, and that this request was granted, the said judge stating that he would comply with it; that on November 14, the day after said case was submitted, it came up for final hearing in the absence of the plaintiff and her counsel, the court announcing its decision finding for the defendants and dismissing plaintiff's cause of action, and fixing the supersedeas bond in the sum of $200, but failed to allow 40 days to prepare and submit to defendants a bill of exceptions, as requested and agreed upon; that R. J. Millard, assistant counsel for plaintiff, applied to the official reporter for a transcript of the evidence, but the reporter was not able to prepare and furnish the same within 15 days from the adjournment *sine die* of the said November term of said court, and failed to do so; that said term of said court was adjourned *sine die* November 17, 1911; that the plaintiff had relied upon being able to obtain a transcript of said evidence from the reporter, and had not taken the same in writing; that it was impossible to take the same in longhand at the time of the trial, and the reporter was furnished under the law to take said evidence in shorthand; that the failure to prepare said bill of exceptions was due solely to the inability of the reporter, and not to the negligence of her attorneys; that within the time allowed by law the plaintiff gave supersedeas bond in the sum of $200, which was duly approved; that on December 20, 1911, the official reporter had prepared and delivered to said R. J. Millard a transcript of the evidence in said case, and on said day said Millard served the same on defendants through one of their attorneys, who, on December 29, 1911, returned the same with the objection indorsed

thereon that it was not presented within the time required by law; that on December 29, 1911, the bill of exceptions was presented to the trial judge by the plaintiff, and on January 5, 1912, plaintiff filed with said judge a motion, supported by affidavit, asking for extension of the 40 days from the expiration of the 15 days after the adjournment of the court *sine die,* being the time fixed by law for serving a bill of exceptions, and that said judge denied the motion and disallowed said bill; that within 40 days of the time the court adjourned *sine die* the bill of exceptions had been prepared and presented to opposing counsel by the plaintiff, and because of the neglect or refusal of the said judge of the district court to give the said 40 days, as he had announced that he would do, the plaintiff was denied the opportunity of perfecting her bill of exceptions.

From this statement of the facts it is evident that the plaintiff was misled by the statements of the court and lulled into the belief that the time to prepare the bill of exceptions would be extended. It is a matter of common knowledge that this 40 days extension is made, as a matter of course, in perhaps the majority of the cases tried in the district courts of this state. On account of the failure to enter this order the next day as alleged, and the further inability of the court reporter to furnish the stenographic report of the testimony within the 15 days allowed by statute, the plaintiff was deprived of the right of review in this court guaranteed to her by the constitution. In *Holland v. Chicago, B. & Q. R. Co.,* 52 Neb. 100, it is held that a litigant should not be deprived of the right to have his case heard in the court of last resort on account of the inability of the official stenographer to furnish him with a copy of the testimony, and that if the person desiring the transcript is without fault, and in consequence of this inability a bill of exceptions cannot be had, a court of equity in a proper case will grant a new trial. It appeared in that case that the reporter had lost a part of his stenographic notes and was therefore unable to furnish a transcript. The petition therein contained the averments that, in a case wherein the appellant had been plaintiff and the

appellee defendant, there had been a judgment adverse to defendant; that within the 40 days allowed by the court for settling a bill of exceptions the plaintiff applied to the stenographic reporter of the court for a transcript of the evidence; that the reporter was unable to furnish it on account of having lost a part of his notes; that the failure to prepare the bill was due solely to the loss of said notes; and that plaintiff, by reason of the inability to procure a bill of exceptions, was unable to secure a review of his case in the supreme court. The district court dismissed the petition, but the judgment was reversed and the cause remanded by this court. Similar holdings were made in *Curran v. Wilcox,* 10 Neb. 449; *Richards v. State,* 22 Neb. 145; *State v. Gaslin,* 32 Neb. 291; *Mathews v. Mulford,* 53 Neb. 252; *Zweibel v. Caldwell,* 72 Neb. 47, 53. In the first opinion in the *Zweibel* case it was stated that, in the absence of any showing of error upon the trial, "the loss, without fault, of one's constitutional right of review would seem sufficient to warrant a new trial, and that prejudice will be presumed." A motion for rehearing was filed. The motion was overruled, and the court adhered to the former judgment, but an opinion was written, which held: "It must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault." None of the former cases are mentioned or overruled either in the opinion or in the syllabus. This being so, counsel for plaintiff was justified in relying upon the doctrine of the cases cited, and in filing a petition substantially in conformity with the petitions in cases where the relief had been granted. The original case was tried in the district court without a jury, and is said in the briefs to be an action in equity in which a motion for a new trial is not essential to a review.

It is claimed that it must be alleged and shown that there was error in the court below in favor of the party

who seeks relief. It is enough that he has been denied his constitutional right of review of the proceedings. It is not a case alone where he has been beaten in a meritorious controversy alleged and proved. It is just a case where he has been denied the right to review the proceedings of the court below.

Section 24, art. I of the constitution of the state, reads: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." It will be seen that this section says "all civil cases." It does not say all meritorious cases, but all civil cases. This means that none is to be excluded. If the power was forbidden to be exercised except in those cases where errors are alleged and proved, or when merit must first be shown, then the appellate court might consider the case before it was properly reached, and so not have an opportunity to consider it as it ought to be considered; or it might refuse to consider it at all. In any event, the people, by the adoption of this provision of the constitution, have said to the supreme court, you must not deny "the right to be heard," and this right applies to *all civil cases.*

It is apparent from the petition that the plaintiff was not at fault, and that her failure to present the bill of exceptions within the time limited was due wholly to the inability of the official stenographic reporter to prepare the transcript of the evidence.

The petition states a cause of action, and the judgment of the district court is

REVERSED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissenting.

Under the technical rules of law announced by the majority, cases long since fairly tried and correctly determined may now be reopened and tried over again. A plaintiff whose suit was properly dismissed and whose petition stated no cause of action may have a new trial granted at a subsequent term of court without alleging that he was injured or prejudiced by the dismissal. Parties with real

controversies may be delayed by a litigious person having no grievance to redress in court, though his lawsuit was fully and fairly tried and decided without error. The dispatch of judicial business and the proper procedure in courts of justice will be disturbed by the decision announced by the majority. A plaintiff may obtain more by negligence in failing to assert his rights in court than by making a timely demand for statutory relief. Alleged oral remarks of a judge in advance of a decision may have a greater import in determining rights than a solemn judgment when recorded in the journal of the court. These are unavoidable deductions from the decision of the majority.

The majority, in sustaining the petition herein, authorize a new trial in an independent suit at a subsequent term of court without requiring plaintiff to allege that her dismissed petition in the original case stated a cause of action. The petition for a new trial does not contain an allegation showing that the court committed an error, or that plaintiff was prejudiced by the decision. It does show, however, that plaintiff could have conferred appellate jurisdiction on the supreme court by filing in the office of the clerk a transcript of the judgment without a bill of exceptions. Did the trial court refuse to perform any duty enjoined upon him by law in connection with the bill of exceptions? If so, upon a proper application to the appellate court, either in the appeal or in an original action for a writ of mandamus, the performance of that duty would have been coerced. By the assertion of legal rights a resort to equity for relief could have been avoided. The first rule of law announced by the majority to justify a new trial is stated in the syllabus as follows: "A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time."

The petition for a new trial shows on its face that plaintiff was not deprived of a bill of exceptions "by reason of the inability of the stenographic reporter to furnish a tran-

script of the testimony in time." The statutory time, had it been properly extended, was ample. Within that time the reporter, in fact, extended his notes. The petition shows that plaintiff understood an extension of time was necessary, because she orally asked for it in advance of a decision, and relied on an oral announcement from the bench, ignoring the public journal, which disclosed the truth. The petition for a new trial shows on its face that plaintiff was deprived of a bill of exceptions through failure of the trial judge to conform to an oral announcement of his purpose to allow plaintiff 40 days for the preparation of a bill of exceptions, in the event of a dismissal, and through failure of her counsel to discover the omission and to procure such an order within the statutory period. Under the facts pleaded in the petition for a new trial, it was the duty of plaintiff to ascertain from the journal that the trial judge had forgotten to grant an extension of time, to remind him of that fact, and to procure the necessary order. This negligence on the part of plaintiff was not an "unavoidable casualty," within the meaning of that term as used in the statute enumerating the grounds for setting aside a judgment after expiration of the term at which it was rendered. Code, sec. 602 (Rev. St. 1913, sec. 8207). Had plaintiff procured a bill of exceptions and prosecuted her appeal to the supreme court within the time allowed by law, a new trial would not have been granted, unless the petition stated a cause of action and the record disclosed a prejudicial error. After expiration of the term at which the judgment was rendered, the majority, by sustaining the petition in equity, have authorized a new trial, for what, in reality, is plaintiff's negligence, without knowing that a cause of action was stated in the original petition, and without a showing that there was error in the proceedings. Under the rules announced by the majority, therefore, plaintiff may obtain more by negligence than by a proper and timely assertion of legal rights. The constitutional right of appeal was never intended to make a farce of appellate procedure or of equity jurisdiction by reopen-

ing litigation settled by a fair trial and a proper judgment. The law, after a full hearing, was once declared by a unanimous court to be different from the decision in the present case. In *Zweibel v. Caldwell*, 72 Neb. 53, it was said:

"In an action in equity to obtain a new trial of an action at law on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault."

I am unwilling to depart from this wholesome doctrine, and therefore dissent from the opinion and judgment of the majority.

SEDGWICK, J., concurs in above dissent.

WILLIAM I. TOOP ET AL., APPELLEES AND CROSS-APPELLANTS, V. FRANK PALMER ET AL., APPELLANTS AND CROSS-APPELLEES.

FILED FEBRUARY 26, 1915. No. 17,852.

Vendor and Purchaser: FRAUD: RIGHT TO RELIEF. Plaintiffs, citizens of this country and residents of sister states, were sole heirs of the owner of a farm, in Butler county, who died intestate and without issue. There were living nonresident aliens of the same degree of kinship to the decedent as plaintiffs. Plaintiffs had not been advised as to their legal rights, and supposed that their alien kinsmen were joint heirs with them to the said farm, in the proportions of one-third to them and two-thirds to such aliens. Defendant Palmer, acting for himself and for those who subsequently formed the defendant land company, with full knowledge of the mistaken belief under which plaintiffs were laboring, induced them to sell the land to him for a sum based upon the valuation of a one-third interest therein. He at the time did not inform plaintiffs of their mistake, but added to their belief that

they only owned a one-third interest by representing to them that he intended to purchase the other two-thirds interest from the alien heirs. *Held* a fraudulent transaction from which plaintiffs are entitled to be relieved, as against the defendant Palmer and all others acting in concert with him in said fraudulent transaction, or who subsequently obtained any title or interest in the land, directly or indirectly, with knowledge of his fraud.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

R. S. Norval, L. S. Hastings and *E. A. Coufal,* for appellants.

Hall & Bishop, R. C. Roper and *C. M. Skiles, contra.*

HAMER, J.

The defendants, Frank Palmer and the Ulysses Land Company, appeal from the judgment of the district court for Butler county. John Toop, who was born in England, located in Butler county, Nebraska, during the year 1884. He continued to reside in that county until July 28, 1897, when he died intestate, seized in fee of 160 acres of land in that county near Ulysses, and being the premises in controversy. He left surviving him Sarah A. Toop, his widow, who resided with him upon the premises, and the following next of kin, to wit: The children of Betsey Orchard, who was a deceased sister; and the children of William Toop, who was a deceased brother, all of whom were English citizens and residents of England, and shall hereafter be referred to as such English kin; Emily Tremlin, of Pinconning, Michigan, and Sarah Jane Dyer, of Kane county, Illinois, being the children of Mary Ann Plowman, a sister of Mr. Toop; and William I. and Jesse Toop and Florence Behrend, all of Auburn, Iowa, who were the grandchildren of Mrs. Plowman, the surviving issue of William Toop, a deceased son of Mary Ann Plowman.

Unless the English kin inherit, the sole heirs at law of John Toop at his death, aside from his widow, were Mrs. Tremlin and Mrs. Dyer. The English kin were related to John Toop in the same degree as were Mrs. Tremlin and

Mrs. Dyer. Whether or not they inherit depends upon the efficiency of our statute barring aliens from inheriting, which is now in litigation in the supreme court of the United States in an action pending between the English kin and the defendants in this action. When John Toop died in 1897, he left a widow, who died in 1907. He left as next of kin children of a brother and sister, who were nonresident aliens, being citizens of England, above referred to, and he also left the children of a sister, the latter being residents and citizens of the United States, residing in Iowa, Illinois, and Michigan. It is claimed by the appellees that it is conceded, under section 10874, Ann. St. 1911, that nonresident alien heirs could not, and did not, inherit farm lands, and that no treaty was then in force abrogating the statute. It is therefore claimed by the appellees that it is conceded that the children of the deceased sister who reside in the United States, and were citizens of the United States, took the whole of the farm lands of which John Toop died seized, being a quarter section of farm land near Ulysses, valued at $20,000. There is also some town property, which is not in issue in this suit.

Soon after the death of Sarah A. Toop, the widow of John Toop, Frank Palmer, the principal defendant, talked to his brother Alfred R. Palmer, Reed Rihard, H. L. Pence and H. C. Withers about buying land. This talk was in the flouring mill at Ulysses, being the place where Pence worked, and where it is claimed these parties then met to talk over their business ventures. It is claimed by the appellees that Frank Palmer, before the meeting at the mill, had advised with two different attorneys as to whether the English heirs could inherit, and that he stated at the meeting that he had been advised that the English heirs did not inherit. It is also claimed by the appellees that those present at the meeting had good reason to believe that the American heirs did not know of the statute barring the English kin from inheriting, and were of the belief that the foreign kin took two-thirds of the estate.

It is further claimed by the appellees that, four or five days after the meeting at the mill, Palmer went to Iowa and Michigan to buy out the American heirs. The American heirs believing that they took but one-third of the estate, and being assured by Frank Palmer that such was the fact, and that he expected to buy out the English heirs, were quieted by these assurances, and, being ignorant of the real value of the farm, quitclaimed their interest in it to Palmer for a total sum of $5,000. At the time they did this, it is claimed by the appellees that these American heirs believed that they were selling and conveying one-third interest in the farm only, and that the English kin were entitled to the other two-thirds, which Palmer had stated to them he intended to buy.

On January 8, 1906, prior to this suit, Sarah Jane Dyer had conveyed to William I. Toop what they then both believed to be a one-third interest, but what was, in fact, as it is claimed by the appellees, a one-half interest. Before the commencement of this suit an amicable adjustment of their mistake was arranged between them to the satisfaction of both parties. For the purpose of this suit it is claimed by the appellees that William I. Toop has succeeded to all the rights and interests of Sarah Jane Dyer, and the latter does not ask for any relief in this suit. The only owners of the land, therefore, at the commencement of this suit, were William I. Toop and Mrs. Tremlin, who owned a half interest each; the other plaintiffs, as it is claimed by appellees, probably not inheriting under the construction of our statutes.

When Frank Palmer returned from Iowa and Michigan with his quitclaim deeds, he immediately placed them on record, and then claimed to be sole owner of the quarter section, which, it is claimed by appellees, is of the value of $16,000 to $20,000, and for which he had only paid $5,000. It is said that he then called together the same parties who had met at the mill and planned his trip, "the mill conspirators," and suggested the organization of the Ulysses Land Company, to play the role of "innocent purchasers." It is claimed by the appellees that Palmer then became presi-

dent and manager of this Ulysses Land Company, the chief purpose of which, if not the only purpose, being to hold the title as an "innocent purchaser." Palmer then conveyed to this company. It is further claimed by the appellees that, with the view to further cover up the property, the company borrowed $6,000 of the Northwestern Mutual Life Insurance Company, although, as it is claimed by the appellees, the evidence shows that this land company had no use for the money. It is then said by the appellees that Pence moved to Kentucky, being first paid $1,000 for his interest in the spoils of the conspirators, although he had not put a dollar into the deal.

When the American heirs learned that the English heirs did not inherit, they brought suit to cancel their deeds to Palmer on the ground of fraud and conspiracy, misrepresentation, and mistakes of fact, and tendered back to defendants the $5,000 paid them by Palmer.

The district court found for the plaintiffs, setting aside the deeds and decreeing that the $5,000 tendered should be applied on the $6,000 mortgage of the Northwestern Mutual Life Insurance Company, but allowing the defendants to retain the $1,000 remainder of the loan. The defendants appeal generally, and the plaintiffs appeal from that part of the decree allowing the defendants to retain the $1,000 mentioned.

It is claimed by the appellees that Frank Palmer, who personally procured the deeds above mentioned, was the principal participant in a series of fraudulent acts. Some of the matters charged against Mr. Palmer do not appear to have any connection with this case, and as to these matters we will not take any time or expend any labor; we will consider those matters only which appear to be connected with this transaction. It is charged that his brother, Alfred R. Palmer, his wife, Lillian Palmer, Reed Rihard, his business partner, and H. C. Withers and H. L. Pence, his two intimate friends, were engaged with him in the organization of the Ulysses Land Company. The answer denied all of the alleged fraudulent acts upon the part of Palmer and his associates. Palmer testified that he

never told any of the persons associated with him in the deal what he paid for the land, nor "anything about how he got the deeds," not even his wife.

Mr. Pence testified that they met at the mill about four days before Palmer went to Iowa and got the quitclaim deeds which the court below canceled and set aside. The witness further testified that at this meeting "Frank Palmer said he knew of land that he thought would be for sale soon, known as the Toop estate." The understanding of the American heirs seems to have been that two-thirds would go to the English heirs and one-third to the American heirs. The American heirs were the sole and only heirs who did inherit. Palmer stated in a conversation with Mr. McGovan that he felt pretty safe because he had the opinion of the two lawyers, naming them, that the English heirs did not inherit. The scheme to get the deeds appears to have been a joint affair, although Palmer was more active in the transaction than any one else. Mr. Pence admitted that Mr. Palmer paid him $1,000 for his share of the profits in the transaction. This fact was also stated by Mr. Palmer to S. E. Robey. Whatever Pence got out of the deal, whether it was $1,000 or $775, or any other sum, he was in any event well paid, because he did not invest a cent. Mr. Pence claims that the organization of the company was suggested by Mr. Palmer after he got back from buying the land and when he "got the deeds for it in his name." The parties who organized the company seem to have all participated in the transaction.

It is claimed on behalf of the appellees that there is no evidence in the record showing that Palmer sought to relieve the American heirs of their belief that the English heirs took two-thirds of the estate. As a matter of fact, William I. Toop was the owner of one-half of the estate. Mr. Toop believed that the English heirs had a two-thirds interest in the estate. He told Palmer at the bank before the contract was signed for his share that he (Toop) in 1906, while the widow was still living, had tried to buy out the English heirs, but had failed. Mr. Palmer then

remarked "that he wanted to buy them out if he could buy them right."

The evidence shows that Palmer undertook to establish in the minds of the American heirs, who actually inherited the property, the idea that their interest was a comparatively small interest, because of the fact that the English kin were also heirs and that they held two-thirds of the estate. An examination of the testimony shows that this idea was continually kept before the heirs that Mr. Palmer met. Palmer knew that there were no English heirs; that, while they were English kin, they were not heirs, and could not inherit the property; and that, by reason of that fact, the interest of the American heirs was very much increased. He successfully practiced this deception. He knew that the representations that he was making to Toop and the other heirs were fraudulent, and he made these representations apparently with the intent to deceive and obtain this property for little or nothing. The evidence also shows that the Ulysses Land Company was organized in furtherance of the scheme to defraud the plaintiffs. This is one of the cases where the facts cannot be dwelt upon without saying things that seem to be harsh.

The knowledge which the defendants had of the actual condition of the title and ownership of the land they kept to themselves, and they thereby deceived and misled the plaintiffs as to material facts within their knowledge, when common honesty required a truthful statement. To deny the plaintiffs relief would be to shield and encourage fraud. We are unable to find any reason for setting aside the judgment of the district court. We think it is right, and it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JOHN MOLL, APPELLANT, V. ADOLPH HAGERBAUMER ET AL., APPELLEES.

FILED FEBRUARY 26, 1915. No. 17,938.

Easements: PRESCRIPTIVE TITLE. Where the use of a "way" is permissive, and the access to it is through a gate, which is kept locked and under the control of a third party, there is no such adverse right as may become the foundation of a title obtained by prescription.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

C. E. Abbott, for appellant.

F. W. Button, contra.

HAMER, J.

The plaintiff, John Moll, appeals from a decree of the district court for Dodge county, Nebraska. He brought the suit to enjoin the defendants, Adolph Hagerbaumer and Charlotte Hagerbaumer, his wife, from maintaining fences interfering with the use by the plaintiff of what he claimed as a private way and easement. The plaintiff claimed to have owned for more than 40 years the right of ingress to a certain tract of land owned by him, and to reach which it was necessary to travel across the defendants' land. The plaintiff filed his petition June 19, 1911. He claimed that for more than 40 years he had, by himself and through his grantor, owned in fee simple and been in possession of the east half of the northeast quarter of the northeast quarter of section 25, township 19, range 8, Dodge county, Nebraska, together with a private way and easement eight feet wide extending from the north line of said land northerly across the east half of section 24, township 9, range 8, and connecting with the public road in the south one-half of the northwest quarter of section 19, township 19, range 9, all in Dodge county, Nebraska. He alleged title by mesne conveyances, and also by adverse

possession, of both the land and said "way" for more than 40 years. He also alleged that for more than 40 years immediately preceding the filing of his petition the said private "way" had been the only means of ingress to and egress from the said small tract of land above described as belonging to him.

The land belonging to the plaintiff is a small tract. It appears that there were a number of small tracts of land, containing usually about ten acres, which joined the Hagerbaumer land. When the Hagerbaumer land was fenced, these parties who owned the small tracts were obliged to cross the Hagerbaumer land in order to reach the little tracts which they owned. These tracts appear to have been ten-acre tracts. In order to go to the land, the gate which opened into the Hagerbaumer land off the road would have to be opened. This gate was kept closed, and before the gate could be opened it would be necessary to get the key. This key was kept at the Hagerbaumer residence, and Moll and the others would go to the Hagerbaumer residence and get the key and open the gate, and then go to the small tract of land owned and used by them. Hagerbaumer himself owned one of these little tracts of land. Although Moll had to go to Hagerbaumer's house to get the key to open the gate, and then had to drive across Hagerbaumer's land, he claimed that he had a right to this private way.

The question presented is whether the "way" was owned by the plaintiff by prescription. He does not seem to have purchased it. He had to get the key which opened the gate into the Hagerbaumer tract from Hagerbaumer's house. It is shown apparently that the right to the private road or way was permissive. If the defendant controlled it by reason of a gate which he kept closed, and which the plaintiff could only open when he got permission from the defendant, the right to travel the "way" was permissive only. Wolcott, Geisler and Peters testified that the right to go over this "way" to the plaintiff's timber land was permissive. It seems that the other owners recognized this right to their timber land as permissive. These

tracts ran across the Hagerbaumer land and cut it up. They seem to have injured the pasture. If access to these private roads was through the Hagerbaumer gate, which Hagerbaumer kept locked, then there was no right of entrance until Hagerbaumer concluded to give these parties the key. Can an adverse right be founded upon permission of this sort? If the beginning was permissive and the "way" a mere license, then it could not ripen into a prescriptive right, however long it might be continued. *Bone v. James,* 82 Neb. 442; 14 Cyc., 1150. A prescriptive right will not commence to run until some act or fact exists giving the party, against whom it is claimed, a cause of action. *Roe v. Howard County,* 75 Neb. 448, 5 L. R. A. n. s. 831; *McCutchen v. McCutchen,* 77 S. Car. 129, 12 L. R. A. n. s. 1140.

In this case the "way" began permissively. Thereafter there was interruption all the time. The gate was a perpetual notice that the way was permissive. The witnesses all testified that the owner held the key. The fact that there was a gate which permitted egress from the "way" and ingress to it must rebut any claim, of adverse user. *Warth v. Baldwin,* 84 S. W. (Ky.) 1148; *Ingraham v. Hough,* 1 Jones' Law (N. Car.) 39; *Luecken v. Wuest,* 31 Ill. App. 506.

To establish a private right of way by prescription, the line of the traveled road must be definite. The practice of passing over land in different directions, however long continued, does not establish a right of way by prescription. 14 Cyc. 1156; *Smith v. Nofsinger,* 86 Neb. 834. The rule that a definite traveled road is necessary to a prescriptive right is a wholesome one. If it were not so, a man's land might be confiscated for roads.

The plaintiff's rights are no greater than the other owners of timber lands. If the plaintiff has a prescriptive right across the pasture, then so have the others, and, as a result, Hagerbaumer's land is confiscated for private roads. In any event we think the plaintiff was a mere licensee.

The judgment of the district court appears to be right, and it is

AFFIRMED.

CHARLES J. DEUPREE, APPELLEE, V. SIDNEY D. THORNTON, JR., ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 17,942.

Conspiracy: DAMAGES. A mere tacit understanding between conspirators to work to a common unlawful purpose is all that is essential to a guilty combination. Damages caused thereby may be recovered by the party injured.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

S. D. Thornton and *M. F. Harrington,* for appellants.

H. C. Vail and *E. D. Kilbourn, contra.*

HAMER, J.

This is an appeal from the judgment of the district court for Antelope county. The case was tried before Judge Welch and a jury. The verdict was for $3,000, and judgment was rendered upon it, and a motion for a new trial overruled. The plaintiff was a married man living with his wife and daughter in a little hotel in the village of Orchard, in Antelope county. His business was conducting this hotel. He did it by serving meals and lodging to his customers and to the public in the ordinary course of hotel business. The defendants are charged with conspiring together to destroy the plaintiff's business as a hotel keeper by charging that his hotel was a house of ill fame resorted to for purposes of prostitution. The defendant Thornton, Jr., was a banker; Lindquist and Goldsmith were merchants; Fletcher was a lumber dealer; and Hicks was engaged in the livery business. Thornton was chairman of the village board; Lindquist, Goldsmith, and Fletcher, and one Archie D. Joyce, who is not a party to the case, were members of the village board. Hicks was the village marshal. It is charged that they made a wicked contrivance, being in substance as follows: "Mr. Deu-

pree: Notice is hereby given that we, the undersigned town board and citizens of Orchard, have absolute evidence that you are keeping a house of ill fame, and that you are hereby notified to leave town in ten days." This was signed by Lindquist, Thornton, Goldsmith, Archie D. Joyce and John Thomas Fletcher. It is claimed that the defendants induced the plaintiff's customers to leave the hotel. There is testimony in the record tending to show that Hicks would meet commercial travelers and others who were on their way to the hotel, and that he would inform them that the hotel was a house of prostitution, and in this manner he would prevent people from going to the hotel, The evidence tends to show that the plaintiff ran the hotel from October, 1907, to October, 1909; that during October, November and December of 1907 the plaintiff made about $500 a month profit by reason of his hotel business. Toward the latter part of the two years he was unable to make expenses, and finally had to quit, and became a carpenter in another village.

The plaintiff testified that the defendant Fletcher told him that a petition was being circulated against the hotel; that there was a notice directed to the plaintiff telling him that the town board and citizens of the village of Orchard had absolute proof that he was keeping a house of ill fame, and that the notice directed the plaintiff to quit town within ten days, and that the same was signed by the defendants. This appears to have been in June, 1908. Lindquist told him that he had signed the petition, and that it was in circulation, and Goldsmith told him that he had signed the petition and of circulating the same, and said that the town board and other citizens had signed the petition. There is testimony tending to show that Hicks would meet the trains when they came in, and would tell the traveling men that the plaintiff's house was not a decent house, that it was not a fit place for a man to stop, and that nobody stopped there. He also characterized the house as a house of prostitution, using a defamatory and vulgar term in characterizing it. Alonzo Andrews testified that Hicks presented the petition to him in the bar-

ber shop, and told him that the plaintiff was running a house of ill fame. Andrews saw a number of names on the paper. The defendant Goldsmith admitted that he signed the petition in May or June, 1908. Bert Johnson testified that he heard there was a petition in circulation. Tom Drayton admitted that he knew the petition was being circulated. Herman Brewster was seen by Hicks in the barber shop. Hicks wanted to know of him if he wanted that sort of a house kept in town, using a very offensive term. Thornton admitted that he signed the paper, but claimed that he did not know what it was. He said he did not remember whether it was Lindquist or Hicks or John Thomas Fletcher who brought the paper to him. Thornton testified that the defendants and others were talking about the hotel and said that Deupree should be run out of town. After that they met in Bone & Fletcher's office. Goldsmith admitted signing the paper, and Fletcher admitted it, and also admitted that he talked the matter over with the other defendants. Several witnesses testified that the hotel had a good reputation until after this petition was circulated. There was some testimony to the effect that two or more of the girls did not have a very good reputation, but the plaintiff's wife testified that she discharged them. There was some testimony tending to show that the plaintiff knew of specific cases where a disreputable woman had been brought to his house. The plaintiff denied the truth of this testimony.

In *Farley v. Peebles,* 50 Neb. 723, it is held: "A conspiracy, like other facts, may be proved by circumstantial evidence, and one means of proof is by showing overt acts of the individuals charged with conspiring. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object."

A person has a right, under the law, as between himself and other persons, to pursue his calling or business without interference or obstruction from others, and an in-

fringement of this right by others is an illegal act. *Van Horn v. Van Horn,* 52 N. J. Law, 284, 10 L. R. A. 184.

An agreement among the merchants of a town or village not to buy any goods of drummers who boarded at a certain hotel, the owner of which has incurred the displeasure of members of the combination, is an unlawful conspiracy, and, when put into execution to the injury of the owner of the hotel, he is entitled to recover damages. *Webb v. Drake,* 52 La. Ann. 290, 26 So. 791.

Where the gist of the action is injury done to plaintiff's business, it is proper to show the extent and character of the business and its volume, both before and after the publication of the libelous article. *Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713.

The evidence shows that Thornton, Goldsmith, Lindquist and Fletcher signed the petition and Hicks circulated it. Whatever the purpose of the defendants may have been, they seem to have succeeded in destroying the business of the plaintiff.

A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty, actionable combination. *Patnode v. Westenhaver,* 114 Wis. 460.

As to the extent of the damages, we will quote from the case of *Thomas v. Shea,* 90 Neb. 823: "The entire publication was a vicious assault upon plaintiff in his profession of attorney at law. It strikes at his means of livelihood. If the accusations are true, he is unfit to be county attorney or to act professionally for an honest client. Those who believe the charges will not employ him, if they want honest service. * * * In determining compensatory damages in such a case, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error."

There is a conflict of evidence. It has been determined against the defendants. We see no error which justifies a

reversal of the judgment of the district court. The judgment is right, and it is

AFFIRMED.

MORRISSEY, C. J., not sitting.

JOHN F. STOUT, APPELLEE, V. OMAHA, LINCOLN & BEATRICE RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,945.

Action: JOINDER: CONTRACT: QUANTUM MERUIT. An action on a *quantum meruit* may be joined in a petition with an action on an express contract, and a verdict and judgment will satisfy the liability as to both claims where they have their origin in the same transaction.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

D. J. Flaherty, for appellant.

Halleck F. Rose, Wilmer B. Comstock, Arthur R. Wells and *E. C. Strode, contra.*

HAMER, J.

This is an appeal from a judgment of the district court for Lancaster county. The plaintiff, John F. Stout, sued personally and as the surviving partner of Hall & Stout, to recover for services rendered by said Hall & Stout as attorneys for the defendant. Two causes of action are alleged, one upon a *quantum meruit* and the other upon an account stated. Upon the *quantum meruit* the petition seeks to recover for the reasonable value of the services. On the express contract of settlement the plaintiff seeks to recover $3,000 claimed to have been agreed upon between the parties. Both causes arise out of the same transaction —the services as attorneys. In the plaintiff's brief it is alleged that the purpose of including the two causes of action was to permit the introduction of proofs that would

sustain a recovery on one theory or the other, and so avoid a possible miscarriage or the necessity of resorting to a subsequent suit. There was a jury trial, and the jury rendered a verdict for the plaintiff in the sum of $2,800, and interest thereon from April 28, 1909, in the sum of $604.33. On this verdict a judgment was rendered for the plaintiff for the full amount, and a motion for a new trial was overruled.

In a very clear instruction to the jury the court told them: "The plaintiff's petition contains two causes of action, both of which are for recovery for the same services performed by Hall & Stout as attorneys at law for defendant. One cause alleges an express promise and agreement of defendant to pay the specific sum of $3,000 therefor, made about the month of July, 1909. The other alleges the reasonable value of said services to be the sum of $6,000. Plaintiff can have but one recovery, based on one or the other of these causes of action, and a recovery on either cause will satisfy the whole claim, which has been merely set forth in varying forms to meet whatever view the jury may take of the evidence."

It is contended by the plaintiff that the joinder of the two causes of action in the same petition is permissible and is expressly authorized by statute under section 7657, Rev. St. 1913: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either of the following classes: First, the same transaction or transactions connected with the same subject of action; second, contracts, express or implied."

In *Scott v. Flowers,* 60 Neb. 675, this court held that a cause of action for false imprisonment might be joined in the same petition with the cause of action for malicious prosecution when both arose out of one and the same transaction.

In *Williams v. Planters Ins. Co.,* 57 Miss. 759, it was held that, where some counts in the declaration aver the

imprisonment in consequence of an alleged malicious prosecution, neither converts the action into trespass and neither constitutes misjoinder.

In *Neil v. Thorn,* 88 N. Y. 270, the charge was: "This is an action for malicious prosecution. There is also in the complaint a charge for false imprisonment, but it all arises out of the same transaction. If there is a cause of action for malicious prosecution, there is also one for false imprisonment. If the whole thing was justifiable then there is neither." The New York court of appeals held: "That while, in the strict and technical sense, evidence to sustain an action for false imprisonment would not sustain one for malicious prosecution, yet as the complaint in fact contained but one cause of action, i. e., malicious prosecution which included the arrest, and as the statement in no way subjected defendants to increased damages there was no error authorizing a reversal."

In *Brinkman v. Hunter,* 73 Mo. 172, it is said in the body of the opinion: "It is well settled in this state that the provision of the code requiring the plaintiff to set forth in his petition 'a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition,' does not prohibit the statement of a single cause of action in different counts, for the purpose of so varying the form of the statement as to meet any possible state of the proof. * * * Where two distinct and different claims are based upon the same instrument, although the plaintiff may be entitled only to a single satisfaction, both may be stated in the same petition, and should, of course, be stated in different counts. *Birdseye v. Smith,* 32 Barb. (N. Y.) 217; Bliss, Code Pleading (3d ed.) sec. 120. In neither case can the court compel the plaintiff to elect upon which count he will proceed."

In *Badger Telephone Co. v. Wolf River Telephone Co.,* 97 N. W. 907 (120 Wis. 169), it was held: "Under Rev. St. 1898, sec. 2647, authorizing the uniting of causes of action on contract arising out of the same transaction, or connected with the same subject of action, a cause of action to recover the reasonable value of certain personal property

sold to defendant was properly joined with an action to recover on a contract for the sale of the same property, to be paid for in capital stock of defendant corporation; plaintiff having alleged delivery of the property, and a demand on defendant to deliver the stock and its refusal, together with the cash value of such stock."

In *Waterman v. Waterman,* 81 Wis. 17, it was held that an action for a *quantum meruit* could be joined with an action on an express contract.

In *Cowan v. Abbott,* 28 Pac. 213 (92 Cal. 100) it was held: "Under Code Civil Procedure, sec. 427, providing that plaintiff may unite several causes of action in one complaint arising out of contracts, plaintiff may allege (1) that he rendered services reasonably worth a certain sum; and (2) an express contract, whereby defendants agreed to pay him the salary usually paid for such services, reasonably worth a stated amount, and, in addition, a bonus of $1,000 if he accomplished a certain result."

The defendant was not subjected to any hazard of double recovery. A single verdict with judgment upon it must extinguish the liability. The instruction of the trial court sufficiently protected the defendant.

The evidence shows a large amount of legal labor, most of it of a not very important character. What amount should be paid for these services was submitted to the jury under the instructions of the court. These instructions seem to be fair. There is evidence to sustain the verdict. The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., LETTON and ROSE, JJ., not sitting.

EMIL J. STRAHL, APPELLEE, V. ROME MILLER, APPELLANT.

FILED MARCH 13, 1915. No. 18,021.

1. **Inkeepers:** INJURY TO GUEST: LIABILITY. An innkeeper is not an insurer of the safety of his guest; but he is bound to exercise reasonable care for the comfort and safety of the guest while in his hotel, and if the guest is injured through the negligence of the innkeeper or his employees the innkeeper is liable therefor.
2. **Constitutional Law:** INNKEEPERS' ACT. The act of 1883 (laws 1883, ch. 47), known as the "Nebraska Hotel Act," does not contravene the provisions of the fourteenth amendment to the constitution of the United States, or deprive an innkeeper of life, liberty or property without due process of law, and is a valid enactment.
3. **Innkeepers:** INJURY TO GUEST: RIGHT OF ACTION. This act confers upon a guest at a hotel the right to maintain a cause of action against the proprietor for injuries received through the negligence of the proprietor or his servants.
4. **Instructions** given by the court, when construed together, found to properly state the law applicable to the evidence.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

John C. Wharton and *Edgar M. Morsman, Jr.*, for appellant.

John A. Moore, H. S. Daniel and *Brome & Brome, contra.*

MORRISSEY, C. J.

Appellee, Emil J. Strahl, January 22, 1911, became a guest at the Millard Hotel in Omaha; the hotel being owned by appellant, Rome Miller. The building was five stories high, and had more than fifty rooms, and was not of fire proof construction. Appellee was assigned to room 404, which was on the fourth floor of said hotel, and retired about 10:30 P. M. During the night a fire occurred in the hotel, and appellee undertook to escape by means of a rope fire escape, and in doing so suffered bodily in-

juries. He brought this suit in the district court for Douglas county against the proprietor of the hotel, alleging that while he was a guest at said hotel a fire broke out therein, and that by reason of the negligence of defendant and his employees it was not properly discovered or controlled, and that a portion of the hotel was burned; that the halls were filled with smoke and gases endangering the lives of the guests and inmates; that appellant and his employees failed and neglected to awaken or give notice to the appellee of the existence of the fire; that appellant failed and neglected to maintain a competent night watchman for watch service; that said hotel was not properly patrolled, examined or inspected for the purpose of guarding against fire and safeguarding the lives of the guests, and that the employees of the appellant neglected and carelessly failed to be at their posts of duty, etc.; that the appellant was guilty of negligence, in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire, and that he did not, as soon as the fire was discovered, ring or cause to be rung the fire gong on the floor on which appellee was sleeping, nor did he ring or cause to be rung a telephone in the room occupied by appellee, or in any way awaken or arouse appellee to notify him of the existence of the fire, nor did he give or cause to be given to appellee information as to the location of the stairways leading from the fourth floor, and that the hotel was not equipped with a sufficient number of stairways, and that appellant was negligent in failing to operate the elevator leading to and from the fourth floor, and in refusing to respond to plaintiff's demand to be removed from said floor, and in failing to have any light, sign or notice indicating the location of the elevator; that appellee's room was equipped with a rope fire escape, which appellant represented could be used in escaping from said room in case of fire, and that said fire escape was too small and was insufficient for this purpose, and that appellant negligently failed to give appellee proper directions for the use of said rope fire escape; that by reason of the said negligence of appellant he has been damaged in the sum of $15,000.

The answer denies all the averments of negligence contained in the petition, and contains an affirmative defense of contributory negligence.

There was a trial to a jury, and a verdict of $6,500 for appellee, and appellant brings the cause here for review.

The evidence discloses that appellee went to his room on the fourth floor of the hotel about 10:30 P. M.; that he awoke about 3:30 A. M., and about five minutes thereafter he detected the odor of smoke; that he arose and turned on the electric light, opened the door, and took down the telephone receiver and asked the office where the fire was, but received no response; he then dressed and went to the elevator shaft, feeling his way along the walls; that the smoke was so thick he could not see the light in the hall; that when he reached the elevator it was not running, but he heard some one holler, "Take the stairway;" that he did not know the location of the stairway, and returned to his room, tried to telephone the office, but received no response, untangled the rope fire escape, threw it out of the window, and tried to go down hand over hand. He testified that he had looked over this fire escape the evening before, and commented to himself, "Well, in case of a fire, a fellow would have a fat chance of getting down on that rope, it is so thin;" that it was equipped with a metal piece to regulate the speed of descent, but that this metal piece would not work, and that he slid down the rope, finally landing on a platform below, and sustained the injuries of which he complains.

His wife and son testified that they visited the room the next morning, and that the rope was very thin. They describe it as being like "a window cord," and the son claims to have thrown the rope out of the window, and that it did not reach within several feet of the platform below, on which the appellee fell. Appellant offered in evidence a five-eighths inch hemp rope fire escape, equipped with a patented metallic appliance to facilitate its use; the rope being of sufficient length to reach from appellee's room to the landing below. Appellee denies that this is the rope fire escape which was in his room the night of the fire,

and on this question there is a direct conflict of the evidence.

It is undisputed that the smell of smoke was detected by one of the employees in the hotel about 1:30 A. M., and that later a guest called the attention of the night clerk to the smell of smoke; that the clerk did nothing further than to look into the cuspidor to see if paper, or some like combustible matter, might be burning there. And this was two hours before the appellee awoke to find the halls filled with smoke. These facts, together with the testimony relating to the fire gongs, fire escape, and the general conduct of appellant's agents, were all properly submitted to the jury.

Exceptions are taken to the instructions of the court, and it is insisted by appellant that no common law liability rests upon an innkeeper to protect his guests from injury by fire, and that the act of 1883 relating to innkeepers contravenes both the state and federal constitutions, in that it deprives the innkeeper of life, liberty and property without due process of law. These points we do not think are well taken. The weight of authority upholds the doctrine of a common law liability. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power so to do. *Clancy v. Barker,* 71 Neb. 83. Section 3104, Rev. St. 1913, the act complained of, reads as follows: "In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper

of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates." This is sufficient to attach a civil liability to the innkeeper for negligence in not properly safeguarding his guest. While an innkeeper is not an insurer of the safety of his guest, yet he may not omit to do the things that are reasonably necessary for his safety and protection. 11 Am. & Eng. Ency. Law (1st ed.) 32. The law seems to be well settled that, when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute, and that such injury resulted proximately from such failure. The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide. "The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect evidence of its violation as going to show negligence." 21 Am. & Eng. Ency. Law (2d ed.) 483, and cases cited. *Wolf v. Smith,* 149 Ala. 457, 9 L. R. A. n. s. 338.

Exceptions were taken to the instructions given by the court; but the instructions appear to be based upon the evidence, and, taken as a whole, no prejudicial error is disclosed.

The question of contributory negligence was properly submitted. The jury were told that, if "failure of the plaintiff to exercise the care that a man of ordinary prudence would have exercised in the circumstances was the proximate cause of the alleged injury, then the defendant is not liable, * * * even though you might also find that the defendant was negligent in not discovering the fire earlier, or in not notifying the plaintiff promptly of its existence."

No complaint is made of the amount of recovery. The issues appear to have been properly submitted to the jury, and the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

SARAH J. JONES, APPELLEE, V. CITY OF AURORA, APPELLANT.

FILED MARCH 13, 1915. No. 18,032.

1. **Eminent Domain:** MUNICIPAL CORPORATIONS: VACATION OF STREETS: DAMAGES: RIGHT OF ACTION. A city ordinance which contains a provision for the "opening, vacating or altering" of streets, and which provides for the election of *freeholders* to act as a board of assessment to assess and award damages to property owners injured by the "opening or alteration" of streets, is not in conformity with section 5133, Rev. St. 1913, providing for the "vacation" of streets, and providing a method of assessing damages therefor, and no action taken thereunder can be pleaded in bar of a property owner's right to maintain an action for damages in the courts.
2. ———: ———: ———: "FREEHOLDER:" "HOUSEHOLDER." The words "freeholder" and "householder" as used in the statute are not synonymous terms.
3. ———: ———: ———: COMPENSATION. When streets of a city are vacated by competent authority, the city must make adequate compensation to abutting property owners whose property is injured thereby.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Affirmed.*

John A. Whitmore, for appellant.

R. J. Nightingale and *H. S. Nightingale, contra.*

MORRISSEY, C. J.

Action to recover damages alleged to have been occasioned to plaintiff's property by the vacation of certain streets in the city of Aurora. There was a trial to a jury

in the court below, a verdict and judgment in favor of plaintiff for $400, and defendant appeals.

The facts briefly stated are as follows: Plaintiff is the owner of lots 10, 11 and 12, constituting the northeast corner of block 23 in the South addition to that city. F street runs east and west, and bounds the property on the north. Eleventh street runs north and south and bounds the property on the east. The lots mentioned front on Eleventh street, and F street makes the north boundary line of lot 12. There is also an alley running north and south through the block at the rear of the lots. The main part of the city lies north of the plaintiff's property and was formerly reached by traveling over Eleventh street. In August, 1911, the city council of defendant passed and adopted a resolution vacating and closing that part of F street which lies immediately north of plaintiff's premises, and on which this property abuts, and vacating and closing Eleventh street from the point where it touches the northeast corner of plaintiff's property for some distance to the north, thereby cutting off plaintiff from direct communication with the main portion of the city over Eleventh street and leaving her premises at the end of a pocket street, and, by closing F street, ingress and egress to the alley was closed at its intersection with said street. These lots were improved, and had for more than 20 years been used by plaintiff as a residence property. Eleventh street was not vacated immediately in front of plaintiff's property, but from the north line thereof. Plaintiff's petition alleged that prior to the vacation proceedings her property was desirable, attractive and convenient as a residence property, enjoying an east and north frontage, with full right of passage over F and Eleventh streets, and that by the vacation proceedings it has been made unattractive and inconvenient and left lying at the end of a cul-de-sac, or pocket street, with no direct access to the business part of the city over Eleventh street and no right of passage up and down F street, and with no means of ingress and egress to and from the north end of the alley, and claimed damages in the sum of $800. Defendant admits the closing of

the streets, but alleged that in the vacation thereof it had proceeded by virtue of the laws of the state relating to cities of its class, a city of the second class having less than 5,000 inhabitants, and under and by virtue of the authority vested in said city by its Ordinance No. 5, which ordinance had been in force and effect since October 8, 1906, and alleged that proceeding under the terms of this ordinance the defendant city in all things complied with the general laws of the state, and that the plaintiff had due notice of the pendency of the proceedings to vacate, and that she duly and seasonably filed her claim for damages, and that "the same was duly heard and considered by a board of five disinterested householders and freeholders, regularly and legally elected under the provisions of said Ordinance No. 5, and that damages in the sum of $100 were regularly and duly allowed to the plaintiff by the said board of assessors, and that the defendant, the city of Aurora, offered and tendered to the plaintiff such amount of damages," and that the tender is still good; that by said appraisal and award there was a final judgment in favor of plaintiff, from which she had not appealed, although the time for such appeal had long since elapsed.

By reply the plaintiff alleges that the assessment proceedings and award of damages were wholly without jurisdiction or authority of law and were ineffective to bar the right of the plaintiff to recovery.

There are a number of errors relied upon for reversal; the first being the refusal of the court to admit in evidence Ordinance No. 5 pleaded in the answer of defendant. By section 4 of this ordinance it provides a method for "opening, vacating or altering" streets, avenues or alleys. Section 8 provides: "If the determination of said council be in favor of opening or altering the street, avenue or alley they shall at the same or the next regular meeting, elect five disinterested *freeholders* of the city who shall, in the discharge of their duties, act under oath faithfully and impartially to make the assessment to them submitted, and assess and report in writing to said council the value of the property taken or injured by the proposed opening or

alteration, which said assessment shall be upon actual view and upon a day appointed by said council not less than sixty nor more than ninety days after the election of the assessors." These sections do not provide for the assessment of damages by reason of the *vacation* of a street, but only for damage resulting from the opening or altering of a street. It will be noted, also, that the ordinance provided for the election of five disinterested *freeholders*, whereas section 8941, Ann. St. 1909 (Rev. St. 1913, sec. 5133), under which this ordinance purports to be drawn, and the only authority for making award of damages provides that the assessment shall be made by "five disinterested *householders*."

A householder is defined as the "head or master of a family; a person who occupies a house and has charge of and provides for a family therein." 15 Am. & Eng. Ency. Law (2 ed.) 774. Householder implies the idea of a domestic establishment, or the management of a household. It implies residence. A freeholder is one who holds land in fee, or for life, or for some indeterminate period, and residence is not an element of the term. That "householders" and "freeholders," as used in the statute and ordinance, are not synonymous terms is too obvious to require discussion. "Householders" is not synonymous with "freeholders" as the latter term is used in a constitutional provision that compensation for property taken for public use shall be ascertained by a jury or board of not less than three freeholders. *Grossman v. Patton,* 186 Mo. 661.

Statutes of this kind must be strictly followed, and there is such a departure from the statutes as vitiates the ordinance, and it follows that the court was right in excluding it.

The ordinance being properly excluded, the record and proceedings of the council and the report and proceedings of the board of assessors were also properly excluded.

Objection is urged to an instruction given which permits a recovery for damage to the three lots, whereas only lot 12 actually abuts the vacated streets. It is said no recovery can be had on account of lots 10 and 11 because they

do not actually abut the vacated streets, and, further, that in the vacation of Eleventh street she suffers only the inconvenience common to the general traveling public. *Enders v. Friday,* 78 Neb. 510, *Lee v. City of McCook,* 82 Neb. 26, and *Van Valkenberg v. Rutherford,* 92 Neb. 803, are cited, but in these cases no part of the property abutted on the vacated part of the street.

Enders v. Friday, supra, is an injunction suit to prevent the mayor and city council of the city of Norfolk from closing part of a street and surrendering possession thereof to a railroad company for depot purposes without paying the plaintiffs for damages to their property, which bordered upon and lay adjacent to a part of the street which was not included in the contemplated vacation. The trial court sustained a demurrer to the petition. In a discussion of the case this court said: "There is nothing to indicate how far west of the vacated part of the street the lots of the plaintiffs are located, and no statement whatever that any of the lots abut upon that part of the street proposed to be vacated"—and upheld the judgment dismissing plaintiffs' petition.

Lee v. City of McCook, supra, is also an injunction suit wherein the plaintiffs sought to restrain the mayor and council of the city of McCook from vacating a street or roadway which it was intended should be occupied by railroad tracks, yards, and switches. The petition disclosed that plaintiffs were the owners of considerable property in and about the city of McCook, but no part of their property abutted upon or lay adjacent to the roadway sought to be vacated, and the court, applying the general rule that only those property owners whose property abuts upon that part of the street vacated are entitled to damages, sustained a demurrer to the petition.

In *Van Valkenberg v. Rutherford, supra,* a suit was brought by plaintiff to annul the action of the mayor and council, and reopen a street. The court found that the plaintiffs owned real estate in the city, but none of it abutted that part of the street vacated, and again applied the general rule, and the petition was dismissed.

In the instant case, the three lots are used as one tract, having common improvements, and, in assessing damages, must be treated as a single piece of property, abutting on the vacated portion of the streets. In closing these streets and placing plaintiff's property at the end of a pocket street, her damage is different from that of the general traveling public, and she suffered damage special and peculiar to this property, and different from that of the general public.

In *Vanderburgh v. City of Minneapolis,* 98 Minn. 329, where the facts are closely analogous, the court said: "Plaintiff owned certain lots fronting on First street in the city of Minneapolis. The city, by action of its council, vacated that portion of said street from the line of plaintiff's lots to the right of way and depot grounds of defendant railway company, thus cutting off plaintiff's right of ingress and egress from that direction and leaving his property fronting on a cul-de-sac or blind alley. Held, That by the vacation of the street plaintiff suffered an injury special and peculiar to his property, not common to the public at large, and is entitled to compensation under the provisions of our amended constitution which forbid the taking or damaging of private property for a public use without compensation."

No error is found in the record, the verdict does not appear excessive, and the judgment is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

CLAUDE B. CALBREATH, APPELLANT, V. SAMUEL E. BAMFORD, APPELLEE.

FILED MARCH 13, 1915. No. 18,034.

Appeal: INADEQUATE DAMAGES. When the evidence is conflicting, a judgment will not be reversed solely because the amount recovered is too small, where the jury has been properly instructed on the measure of damages.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

J. W. James and *Karl D. Beghtol,* for appellant.

Charles E. Bruckman, contra.

MORRISSEY, C. J.

In 1910 plaintiff, who is a physician and surgeon, was practicing his profession in Iowa, and the defendant, who is also a physician and surgeon, was practicing his profession at Hastings, Nebraska. There was an old family acquaintanceship existing between them, and plaintiff, being desirous of finding a new field for his talents, began a correspondence with the defendant which culminated in a partnership agreement between the two. Plaintiff paid defendant $1,000 for a one-half interest in the business and office equipment. Under this agreement they were to carry on the practice of medicine and surgery and divide the earnings equally.

After making this agreement and paying over the $1,000 as the contract provided, plaintiff removed to Hastings and engaged in the practice as contemplated by the parties. Difficulties soon arose, and this suit was instituted in the district court for Adams county. The petition contained two causes of action. As a first cause of action it is alleged that, in order to induce the plaintiff to enter into the agreement, the defendant falsely and fraudulently represented the volume of business which he had done, and that, by reason of the fraud so practiced upon him, he had suffered damage in the sum of $1,000. For a second cause of action plaintiff alleged that soon after making the partnership agreement, heretofore referred to, the defendant sold a one-half interest in a certain drug stock and store to plaintiff, representing to him that he had recently purchased the same for $6,000 and that it was worth that sum, and plaintiff, relying upon these representations, paid $3,000 for a one-half interest in said stock; that the representations so made were untrue, and were made for the purpose of cheating and defrauding the plaintiff, and by

reason of the fraud so practiced he was damaged in the sum of $1,000; and there was a prayer for damages on the two causes of action in the sum of $2,000.

Defendant admitted the formation of the partnership and the receipt of the money, but denied that fraud had been practiced on the plaintiff. As an affirmative cause of action the defendant alleged that plaintiff misrepresented his professional ability; that he neglected the business; and that his habits and conduct were such that he drove business away from the firm, and the business built up by defendant was almost ruined, and prayed judgment for $2,500.

For answer to the second cause of action, defendant admitted selling an undivided one-half interest in the drug-store to plaintiff for $3,000, but alleged that he did not have personal knowledge of the business or of the value of the stock; that he had only recently purchased the stock, and before doing so he made inquiry as to its value, and was assured that it had recently invoiced at $7,000, and was advised that the stock of goods and location were worth $6,000, and he purchased at that price; that the plaintiff expressed a desire to purchase an interest therein, and after defendant detailed all the facts in relation thereto the deal for a one-half interest was made; that later plaintiff and defendant exchanged the drug business for real estate which they took at an agreed valuation of $6,500, and which they still owned, and asked that said cause of action be dismissed and he be given judgment on his counterclaim.

The issues were submitted to a jury, which returned a verdict for one dollar in favor of the plaintiff. Plaintiff appeals, urging as ground for reversal that the amount of recovery is inadequate.

There is more or less conflict in the evidence, and from an examination of the record we cannot say that the verdict of the jury is not fully warranted.

There is no question of law involved. No complaint is made in the brief against the rulings or instructions of the court. All disputed questions of fact having been prop-

erly submitted to the jury, and the evidence being sufficient to sustain the verdict, under the general rule governing cases of this character, we cannot interfere with the findings of the jury, and the judgment is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

ANGUS CAMPBELL, APPELLANT, V. MARY A. HOBBS ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 18,039.

Appeal: AFFIRMANCE. Where no errors of law appear in the record and the judgment of the trial court is sustained by the pleadings and the evidence, it will be affirmed.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Stewart, Williams & Brown, for appellant.

William B. Price, Ray J. Abbott and *Hastings & Ireland, contra.*

MORRISSEY, C. J.

Plaintiff was the owner of a house and lot in the city of Lincoln, and on March 1, 1909, he entered into an agreement for the sale thereof to defendant Hobbs. A writing purporting to contain the terms under which the sale was made was drawn up and signed by each of the parties. In the body of the instrument it is provided that plaintiff shall convey the premises free and clear of all liens and incumbrances except certain taxes, and the consideration is fixed at $2,500, but a special clause inserted reiterates the price, shows the payment of $275 in cash, and an agreement on the part of defendant to make a further payment of $128 on or before April 15, 1909, and $28 each suc-

ceeding month until the full sum of $2,225 is paid, with interest, etc. It then concludes by saying that the purchaser shall take the title subject to a mortgage of $1,500 given to Crete Loan & Savings Association, with interest at 6 per cent. The defendant went into possession of the premises immediately and made instalment payments from time to time until November 11, 1911, when he and plaintiff figured up the balance due on the amount to be paid in excess of the mortgage and found it to be $80. This sum was paid, and plaintiff delivered a warranty deed for the premises. The deed was in due form, but was made subject to a mortgage for $1,500 in favor of the Crete Loan & Savings Association, which mortgage and interest and taxes for 1911 the grantee assumed and agreed to pay. At the time the so-called "articles of agreement" was signed the real estate was subject to a mortgage of $1,300, but in compliance with an oral agreement between the parties plaintiff secured a new loan of $1,500 from the Crete Loan & Savings Association, and procured the cancelation of the former mortgage. In order to secure this loan plaintiff subscribed for 15 shares of stock in this association, and this stock was pledged as collateral security for the loan, and from month to month thereafter there was paid upon said loan and stock the sum of $15, thirty-four payments thus being made. It is admitted that one-half of this amount went to pay the interest on the loan, and the remainder to pay the dues and assessments on the stock, and that the withdrawal value of the stock at the time the deed was delivered was $273.60.

Plaintiff brought this action in the district court for Lancaster county, claiming to be the owner of the stock and entitled to the benefit of his payments thereon, and alleged that the defendant Crete Loan & Savings Association refused to surrender the stock to him or to pay him the sum due thereon, and that the defendant Hobbs claimed the same, or some right therein and refused to permit the transfer of the stock to him, or to pay him the amount due thereon, and prayed that he might be decreed to be the owner of said shares of stock and of the amount of ac-

crued earnings thereon, and that the defendants Hobbs be adjudged to have no right or interest therein, and for equitable relief. The loan association, omitting the formal parts, set out the mortgage and alleged that the stock had been given as collateral security thereto; that it was ready and willing to surrender up the certificates of stock to whomsoever the court might order any time the mortgage loan was paid. The defendants Hobbs answered, admitting the purchase of the property for an agreed consideration of $2,500, and alleged that they had paid the plaintiff the sum of $1,000, together with the accrued interest, and that the plaintiff and his wife had executed and delivered to them a warranty deed to the property described, subject to this mortgage in favor of the Crete Loan & Savings Association, and this mortgage was a part of the purchase price. The court entered a decree in favor of defendants Hobbs, and plaintiff appeals.

The original written agreement is somewhat ambiguous and contradictory, and from an examination of the record we reach the conclusion that the parties themselves did not look to it as a paper containing the entire agreement. Defendant made instalment payments from time to time until November 11, 1911, when he and plaintiff made a settlement, and agreed that there was $80 due the plaintiff. This was paid, and on receipt thereof plaintiff delivered his warranty deed to the defendant. The deed shows that it was made subject to this mortgage of $1,500 and interest, and taxes for 1911. At the time of the delivery of the deed there appears to have been a complete settlement between the parties and it is not contended that there was any mistake in figuring the amount when this balance of $80 was agreed upon. While the plaintiff now contends that he made some mention of a retained interest in the stock of this association, this is directly contradicted by the testimony of the defendant. The defendant's wife was not called as a witness, but it is admitted in the record that, if called, she would testify on this point substantially the same as her husband. On this point the defendant is not only corroborated by his wife, but all of the circum-

stances corroborate him. From this time on plaintiff ceased to pay any dues or assessments on said stock, while the defendant immediately assumed their payment. The conduct of the parties clearly indicates that at the time of this settlement the plaintiff led the defendant to believe that he was taking title to this stock, together with title to the realty. It is agreed that they figured up the amount due and found it to be $80. The plaintiff received the money, delivered the deed, they shook hands and parted, and it was two or three months afterward before plaintiff made any demand for the stock or for any credit on account thereof.

The court was warranted in finding that when the plaintiff deeded the land to the defendant he also transferred the stock to the defendant. From that time on the defendant paid, not only the interest on the money loaned, but also the premiums on the stock. The plaintiff insists that it was with the understanding that he should be reimbursed for the premiums that he had paid upon the stock up to that time, but no such understanding was expressed to the defendant. The stock may have been burdened with risks and uncertainties that are not shown in this record, and the defendant plainly understood that he was taking the stock with the land with all of its burdens and risks. The agreement between the parties being indefinite and uncertain and intended in a different sense by the parties, it would seem to come within the rule that in such case the construction should prevail that the plaintiff had reason to suppose the defendant understood it to have. Rev. St. 1913, sec. 7909.

The judgment of the court is fully sustained by the evidence, and is

AFFIRMED.

BARNES and ROSE, JJ., not sitting.

STATE, EX REL. JOHN STEVENS, APPELLANT, V. J. T. NICKERSON, COUNTY CLERK, ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 18,816.

Licenses: HUNTING AND FISHING: STATUTE: CONSTITUTIONALITY. The provisions of section 2695, Rev. St. 1913, imposing license fees upon persons desiring to hunt and fish in this state and requiring such fees to be paid to the state treasurer for the benefit of the state school fund, are not in conflict with section 5, art. VIII of the constitution.

APPEAL from the district court for Furnas county: ERNEST B. PERRY, JUDGE. *Affirmed.*

John Stevens, pro se.

Willis E. Reed, Attorney General, and *L. B. Fuller, contra.*

BARNES, J.

Action in the district court for Furnas county for a peremptory writ of mandamus to compel the respondent J. T. Nickerson, as county clerk of said county, to pay over to the county treasurer the money collected by him for hunting and fishing licenses for the year 1913. An alternative writ was allowed and issue joined thereon. The only question presented for determination is whether such license money belongs to the county school fund or the state school fund. The district court found for the respondents and denied the application for a peremptory writ, and the relator has appealed.

It is contended that the district court erred in refusing the relief prayed for, and in giving force and effect to that part of section 2695, Rev. St. 1913, which is alleged to be in direct conflict with section 5, art. VIII of the constitution of the state. That section of the constitution reads as follows: "All fines, penalties, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where

the same may be levied or imposed, and all fines, penalties and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." The legislature, at the session of 1901, passed an act to protect fish and game, insectivorous, song and other birds, within the state of Nebraska, and to provide penalties for the violation thereof, and to create a game and fish commission for the state of Nebraska and define its powers and duties. Laws 1901, ch. 36.

By section 1, art. IV of the above act (Rev. St. 1913, sec. 2695) it was provided: "The game and fish commissioner shall, upon application and the payment to the state treasurer of the fee required, issue to any nonresident of this state, a license authorizing such licensee in person within this state to hunt for and kill game, and to fish for and take fish, during the open season for such game and fish, and to have in his possession and dispose of the same subject to all of the restrictions imposed by this chapter: *Provided,* the commissioner may deliver to the county clerks of the several counties blank licenses bearing his signature or a facsimile thereof, and the same may in such case be issued by such clerks in the name of the commissioner upon the terms and conditions above prescribed. All blank licenses delivered to the several county clerks shall be numbered by the commissioner, and when such license shall have been issued by the county clerk of any county as herein provided, he shall immediately notify the state treasurer by mail stating the number of such license, the name and residence of the licensee, and the date when issued, and shall remit the license fee to said state treasurer, who shall keep a record of all licenses issued under this chapter, which shall be open for inspection as in case of other public records of the state." Section 3, art. IV of the same act, provides that licenses may be issued to

residents of the state under the same terms and conditions as in case of licenses to nonresidents of the state. It is apparent that where the game and fish commissioner has delivered to a county clerk of any county a supply of licenses, and said clerk issues them to applicants and collects the license fee, he is acting as a representative of the state game and fish commissioner, who alone has the power to impose the license.

It is argued that the money derived from the sale of hunting licenses is license money arising under the general laws of the state, and that such money cannot constitutionally go anywhere except into the treasury of some county; that Furnas county has a better claim to the money than any other county. This would be so if the license was levied or imposed in Furnas county. The act providing for the issuance of such licenses distinctly says that the license shall be issued by the state game and fish commissioner. It is imposed by the state without reference to any county, and for the benefit of all the schools of the state. To sustain appellant's contention would require us to declare the provisions of the act relating to game and fish unconstitutional. In *Pleuler v. State,* 11 Neb. 547, 555, it was said: "To justify a court in pronouncing an act of the legislature unconstitutional, it must be clear and free from reasonable doubt that it is * * * clearly forbidden by the paramount law."

The constitution does not specifically forbid the imposition of a license by the state at large. The legislature was constitutionally free to provide by what authority the licenses in question should be imposed upon those desiring to hunt and fish. The constitutional provision applies only to license money imposed by a county or some minor municipal corporation, and when a county imposes a license by virtue of a general law authorizing it so to do, such license money belongs to the county school fund. It does not forbid the state itself to impose licenses and direct how such money shall be used for the benefit of the schools. The legislature can exercise such general powers as are not forbidden by the constitution. The New Standard Dic-

tionary defines *impose* as to "levy or exact as by authority." It is apparent that the legislature meant to confer authority upon the state treasurer to collect the license moneys in question. The game and fish commissioner and the various county clerks are agents of the state, and there is no conflict between the provisions of the act and those of the state constitution. The intent of the legislature does not seem obscure.

We are unable to see how the trial court could have rendered any other judgment than the one which he pronounced in this case. The judgment of the district court is therefore

AFFIRMED.

LETTON and FAWCETT, JJ., not sitting.

JOHN WRIGHT, APPELLEE AND CROSS-APPELLANT, V. SELDEN-BRECK CONSTRUCTION COMPANY, APPELLANT; FIRST NATIONAL BANK OF LINCOLN, APPELLEE.

FILED MARCH 13, 1915. No. 17,982.

1. **Negligence:** OPERATION OF ELEVATOR. It is not negligence *per se* to operate an elevator without a call bell in an unfinished building, not open to the public, but only to employees and licensees of the contractor.
2. ———: ELEVATOR ACCIDENT: CONTRIBUTORY NEGLIGENCE. One who desires to call an elevator in an unfinished building should act with care and caution. An elevator shaft is a place of danger, and if one carelessly thrusts his head, through an opening in the door, into the shaft, and on account of such negligence he suffers injury, he is not entitled to recover damages.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed as to the First National Bank and reversed as to the Selden-Breck Construction Company.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Burr, Green & Green, C. S. Allen and *Hall & Bishop, contra.*

LETTON, J.

In 1911 the Selden-Breck Construction Company was engaged in constructing an eight-story office and bank building for the First National Bank of Lincoln, under a contract with that bank. This action is to recover damages against the owner and contractor for negligence in operating an elevator in the building. Verdict and judgment against the contractor, and in favor of the bank. Defendant Selden-Breck Construction Company appealed, and plaintiff has filed a cross-appeal against the bank.

On Sunday, April 30, 1911, the plaintiff, with one McKee, was helping to move the office furniture of the Western Fire Insurance Company by which they were employed, into rooms on the fifth floor to be occupied by it in the new building. The building was not entirely completed, but under the terms of the contract it was to be finished and delivered to the owner on the next day, May 1, 1911. There were two elevators in the elevator shaft. The elevator on the north side was being used by the workmen, and on this day by those moving into the building. The building was not open to the public. There were double sliding doors of metal in place in front of each elevator, with spaces for four panes of glass in each, but the glass had not been inserted. No call bells had been installed, and it was necessary to call for the elevator when wanted. On the north elevator the steel frame and the permanent floor of the car were in position, but a temporary plank floor had been laid over it, and a temporary cage of boards had been constructed to be used until the building was finished. The other elevator was not in use. At noon Curtis, the elevator operator who had been operating it for the contractors, went to lunch, and one Brackett took his place at the direction of Mr. Holmes (who was the president of the Western Fire Insurance Company, and was also the manager of the building for the bank) and Mr. Cunningham, the engineer of the building for the bank.

A few moments afterwards the plaintiff and McKee, who were still upon the fifth floor, wanted to descend. They went to the elevator shaft, the doors of which were closed. There was a full-sized outside window in the shaft—opposite the doors. Each put his head through one of the empty panes in each door, for the purpose of calling the elevator. Almost immediately the elevator descended from the sixth floor, striking each upon the back of the head. Plaintiff's jaw was caught between the bottom of the elevator and the bar across the door, breaking the bone and causing other severe injuries. The instant Bracket, who was operating the elevator, saw the men's shoulders, he reversed the lever, and this undoubtedly saved their lives.

The allegations of negligence are that the car was being operated by a conductor without a license; that on account of the absence of a call bell the defendants instructed the plaintiff to call the conductor orally; that the elevator car was unfinished, and was being run contrary to the laws of the state of Nebraska and ordinances of the city of Lincoln; that the defendants were negligent in "operating, managing and controlling said elevator car, and in running and in stopping the same," and "in not giving notice to plaintiff of the time when said car would be lowered to and approach said fifth floor of said building, and in not placing a guard or a railing or protection in front of said iron doors and windows of said car." It is also alleged that "plaintiff, obeying the instructions and invitations of said defendants and their servants, stepped to said elevator on the fifth floor of said building on the 30th day of April, 1911, to call said conductor orally to stop said car at the fifth floor, and, while in the act of so doing, the defendants" carelessly and negligently ran the car so that it struck plaintiff on the head and caused severe injuries, which are specifically described. The answers are general denials and pleas of contributory negligence.

It is necessary to examine the evidence in order to determine the principal questions involved. Brackett, who is an elevator operator, testified, for the plaintiff, that the elevator was in all respects, except as to the steel cage, in

the same condition as it now is; that electric wires and the balancing chain were hanging below the floor of the car. This chain is shown by other testimony to be 200 feet long, and to be connected at one end to the bottom of the car floor, and at the other to the counter-balance weights, so that when the elevator is at the top of the shaft the entire length of the chain hangs below in plain sight. He had been instructed to take charge of the elevator until 1 o'clock, while Curtis, the conductor employed by the contracting company, went to lunch. Just after he had taken charge of the car some one called for the car to come to the sixth floor. When he reached there the man had gone. He started the car down, and the accident occurred. Most of the workmen had gone to lunch at the time, and there was very little noise in the building. There was no top or covering over the car, and if one stood back from the door at the fifth floor and called for the car he could hear him when he was at the bottom of the shaft. The car was in perfect running order. He was employed by Mr. Holmes, and had been helping the insurance company to move that morning, but he was to run the elevator in the completed building.

Mr. McKee testified that he worked for the Western Fire Insurance Company; that he went up and down a number of times that morning before the accident; that the only way to call the car was "to holler for it through the window." He says he also called by putting his head through the door where the window would be. At the instant before the accident "I put my head in there, I couldn't see anything or hear any elevator coming. Everything was quiet; not a sound. The elevator never made a noise; there was no noise when we went to the elevator shaft; there wasn't a sound." On cross-examination he testified that there was noise of moving desks at the time and a noise on the first floor; that when he was not using the elevator he was not in a position where he could see whether it was going to the sixth, seventh or eighth floor; and that he heard men at work above the fifth floor. Mr. Taylor, another employee of the insurance company, testified that

about a score of workmen were in the building, several in the stories above the fifth floor; he does not remember seeing any chains or wires attached to the bottom of the car.

The plaintiff testified that he went up and down about 10 or 20 times that morning; that he went no further than the fifth floor that day, and did not see the elevator go higher; that a great many men were working in the building; and the noise disturbed him in calling for the elevator. He said, "We always would look to see where the elevator was, if there was anything moving, or if it was coming or if it was going; and there was nothing in sight, so I put my head in and called for it. Q. How light was it in there? A. *As light as day; in fact, it was midday.* Q. Did you hear anything? A. No, sir. Q. What did you do when you put your head in there? A. Called for the elevator to come up. Q. Which way was your mouth or head then? A. Down; face down. Q. How long did you have your head in there before you were injured? A. About a second." On cross-examination he testified that he knew the car was drawn by cables, and that he did not see the cables, and that the shaft was empty when he looked in. On redirect examination he was questioned as to a conversation with Curtis, the elevator man, and Mr. Holmes, the first time he went up in the elevator, and was asked to state fully what Curtis said as to the height the elevator would run. A number of questions directed along this line had previously been excluded, but the objection to this one was overruled. A motion was made to strike out the answer as incompetent, irrelevant, and immaterial, and not relevant to any issue in the case, which was overruled. He then testified that in the morning of that day Curtis, Taylor and himself were going up with the first load of books, papers, desks, etc.; that Mr. Holmes said to the operator, "We go to the fifth floor," and that Curtis said, "Then during the time that you are moving in I don't go above the fifth floor." There is a great mass of evidence more or less relevant, but the gist of that in behalf of the plaintiff material to the determination of the case has been outlined.

Were the defendants or either of them guilty of negligence? The building was incomplete, but the elevator, except for the absence of the call bell was in perfect running order. When plaintiff elected to use the elevator in its unfinished condition he was bound to govern his conduct accordingly. He was as fully aware of all the circumstances as the defendants were, and knew the manner in which it was necessary to call for the elevator. There is no proof that the construction company invited the Western Fire Insurance Company or its employees upon the premises. The fact seems to be that that company began to move on that day for its own accommodation. We must consider the plaintiff's case regardless of the testimony for the defense, which denies much of plaintiff's evidence and is to the effect that any one looking in the shaft could tell at once by the absence of the suspension cables that the car was above that floor, and that the bottom of the car at the sixth floor could be plainly seen from the lobby outside of the doors on the fifth floor.

Unless it was negligence, as a matter of law, to use the elevator without a call bell, no negligence in its operation has been shown. We are satisfied that under all the circumstances it was not negligence *per se* to so operate it, and that it could be used without danger by one calling into the shaft while standing outside of the bars. There is absolutely no evidence that any one ever failed in getting a response while calling in this manner. That plaintiff and his witnesses did not call in this manner is not material. They should have done so. We are convinced that plaintiff was guilty of gross contributory negligence in thrusting his head through the opening. He had no right to place any part of his person beyond the barrier of the door and into a place so full of dangerous possibilities as an elevator shaft, more especially in a new eight-story office building with modern high-speed elevators. His action amounted to the opening of the closed door, which he had no right to do, or, rather, it had the same effect. Ordinary care and prudence should have warned him that it was exceedingly dangerous to place his head into the

elevator shaft. The supreme court of Massachusetts say in *Ramsdell v. Jordan,* 168 Mass. 505: "It is so plainly dangerous for a person to put his head into an elevator well for the purpose of shouting up the shaft for the car to come down that the verdict for the defendant was rightly ordered." *Knapp v. Jones,* 50 Neb. 490; *Bedell v. Berkey,* 76 Mich. 435; *Guichard v. New,* 41 N. Y. Supp. 456; *Kappes v. Brown Shoe Co.,* 116 Mo. App. 154, 90 S. W. 1158; *Knox v. Hall Steam-Power Co.,* 23 N. Y. Supp. 490; *Dieboldt v. United States Baking Co.,* 25 N. Y. Supp. 205; *Mau v. Morse,* 3 Colo. App. 359. The latter case is very similar in its facts to this. The court say: "If a man, in his sound senses, with his eyes open, voluntarily and deliberately, even if carelessly, thrust himself into the jaws of death, we know of no theory upon which any one can be held responsible for the consequences of his act but himself."

As we view the case, it is unnecessary to consider the merits of the cross-appeal, since we find no negligence in the operation of this car by Brackett. It is not contended that Curtis was in the service of the bank. The elevator was under the control and management of the construction company at the time of the accident, though Curtis was relieved by Brackett for the lunch hour. It was using it for its workmen, and incidentally to accommodate tenants who were moving in. *Fuller Co. v. McCloskey,* 228 U. S. 194. The opinion in the case of *Munsey v. Webb,* 231 U. S. 150, on which much stress is laid by the plaintiff, seems to have little relevancy to the question involved here.

It is argued that, on account of the statement and promise made by Curtis, plaintiff was misled and believed there was no danger in putting his head into the shaft. This promise and its breach are not alleged as a ground for recovery. "Where a pleader relies upon one or more specific acts or omissions as negligence, then evidence of any act or omission not within some of such specifications is irrelevant." *Omaha & R. V. R. Co. v. Wright,* 49 Neb. 456. *Elliott v. Carter White-Lead Co.,* 53 Neb. 458. We are convinced that this evidence was erroneously admitted, and that instruction No. 8, which places this is-

sue before the jury and instructed them that, "if you believe from the evidence that the plaintiff was informed that the elevator would not go higher than the fifth floor, and that he believed and had reason to believe that such was the case, then the question whether or not he would be guilty of negligence, or contributory negligence, in thrusting his head into the shaft becomes one for you to determine from all the facts and circumstances of the case," should not have been given. But taking the testimony as to this statement as true, and considering it as within the issues, we are unable to see how it afforded any justification for the plaintiff's act. In the first place, the most natural meaning to be ascribed to the statement, under the circumstances in which it was made, with men at work all over the building, and with the elevator filled with furniture, books, etc., is that, when Mr. Holmes said, "We go to the fifth floor," and Curtis said, "Then during the time you are moving in I don't go above the fifth floor," he meant that he would not go above the fifth floor while carrying their effects; not that he would cease to operate the elevator above that floor. Another consideration is that the statement only had reference to what Curtis himself would do. It did not constitute a promise or agreement that the elevator would not be taken by others above that floor. His statement had reference to his own action alone, and not to that of any other operator. He could not control the action of his employer or of any other of the employees and plaintiff had no right to assume, if he did assume, that he could do so. In whatever light we view this conversation, we can see nothing in it which would justify the plaintiff in projecting his head or body beyond the barriers and through the door into such an exceedingly dangerous situation.

The judgment of dismissal as to the bank is affirmed. The judgment against the construction company is reversed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., not sitting.

EDEN D. HUFF, APPELLEE, V. GRAND LODGE, BROTHERHOOD OF RAILROAD TRAINMEN, APPELLANT.

FILED MARCH 13, 1915. No. 18,029.

1. **Insurance:** CONTRACT: LIMITATION OF LIABILITY. Section 68 of the constitution of the defendant association, of which plaintiff was a member, provides for indemnity upon claims for total disability resulting from certain specified injuries. Another section provides that all claims for disability not coming within the terms of section 68 should be held to be addressed to the systematic benevolence of the order, and should in no case be made the basis of any legal liability on its part. *Held*, That the contract limiting the liability of the association to the disabilities described in section 68 is a valid contract; that such an association may limit the class of risks which it will assume, and that the defendant is not bound to pay claims other than those which it specifically agreed to pay by the terms of the certificate and constitution.
2. ———: BENEFICIAL ASSOCIATION: BENEVOLENCE. It is not against public policy for the members of such an association to agree with each other that a portion of the funds which they contribute may be applied to the relief of members for whose injuries or disabilities no legal liability exists against the association. The mere fact that the objects of this benevolence are to be selected by a beneficiary board does not alter the situation nor create an obligation on the part of the association to pay all claims for total disability arising from causes not covered by the insurance contract.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed and dismissed.*

Lincoln Frost and *Walter L. Pope,* for appellant.

W. B. Price, Ray J. Abbott and *A. E. Howard, contra.*

LETTON, J.

This action was brought in the lifetime of the plaintiff, Eden D. Huff. A judgment was rendered in his favor in the district court. After the case came here on appeal his death was suggested, and the cause revived in the name of his administrator. The action is based upon a beneficiary

certificate issued by the defendant, a fraternal beneficiary association.

The petition alleges that Huff was a member of the association; that on or about the 8th day of October, 1910, he became totally disabled by reason of paralysis, and is now totally disabled, and entitled to the benefits of the beneficiary contract; that "the grand lodge has established and maintained various funds as follows: A general fund, a beneficiary fund, a beneficiary reserve fund, a protective fund, and a convention fund—and that a part of the assessments which this plaintiff has paid to the grand lodge has been segregated in said funds, and that he is entitled to the benefits by reason thereof, and that that portion of the constitution and general rules of said Brotherhood of Railroad Trainmen which reads as follows: 'And shall in no case be made the basis of any legal liability on the part of the brotherhood'—is null and void, for the reason that it is against public policy and contrary to law;" that due and proper proofs of his disability have been furnished as provided for in the general rules and constitution by the defendant; that he has promptly and regularly paid all dues, fines and assessments, but that defendant refuses to pay him the benefits provided for in the constitution and general rules. A general demurrer to the petition was filed, which was overruled. Defendant elected to stand upon the demurrer and not plead further. The court found for plaintiff and entered judgment for $1,500, the full amount of the certificate. A copy of the certificate and of the constitution and general rules of the order was attached to the petition and made a part of it.

The beneficiary certificate sets forth that the plaintiff "is entitled to all the rights, privileges and benefits of membership and to participate in the beneficiary department, class C of said brotherhood, to the amount set forth in the constitution thereof, which amount, in the event of his total and permanent disability, as defined in section 68 of the constitution, shall be paid to him, or at his death shall be paid to Addie Huff, his wife, if living."

Section 60 provides in part: "There shall be three classes of beneficiary certificates, namely, Class A, $500; Class B, $1,000; Class C, $1,500. Each class shall be evidenced by a beneficiary certificate to be issued under the hands of the president and general secretary and treasurer, and in the name and under the seal of the grand lodge. Each certificate shall show in which class it is issued, and provide for the payment, in accordance with this constitution, of the full amount of such class upon the death of the member insured therein, or upon his becoming totally and permanently disabled within the meaning of section 68."

Section 68 provides: "Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise."

Section 69 provides for the manner in which proof of total disability shall be made and acted upon.

Section 70 is as follows: "All claims for disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the brotherhood, and shall in no case be made the basis of any legal liability on the part of the brotherhood. Every such claim shall be referred to the beneficiary board, composed of the president, assistant president, and general secretary and treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and, if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancelation of such certificate; provided that the approval of said board shall be required as a condition precedent to the right of any such claimant to bene-

fits hereunder, and it is agreed that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claims. No appeal shall be allowed from the action of said board in any case; but the general secretary and treasurer shall report all disapproved claims made under this section to the board of insurance at its next annual meeting for such disposition as such board of insurance shall deem just and proper."

Section 71 provides for the manner in which proof of benevolent claims made under section 70 shall be made, which differs from that under section 68.

The appellant contends that the insurance contract as contained in the certificate, the constitution and the by-laws does not cover or include a disability of the nature described in the petition; that the certificate indemnifies only for and against death and permanent disabilities of the nature described in section 68, and that since the disability of the insured was not within the provisions of that section, no liability exists. It also contends that the provisions by which claims for disability not coming within the provisions of that section shall be considered as addressed to the systematic benevolence of the brotherhood and may be considered by the beneficiary board is a valid agreement; that as to this class of claimants there is no fixed and binding obligation resting upon the society. On the other hand, the appellee insists that "the order has no inherent power of itself to deny its members the privileges and benefits prescribed by the general rules and laws governing it; that is to say, when a member does all the things which are required of him to be done, then they cannot deny the things which they promised to do and for which the member has paid his money." The appellee also contends that the portion of section 70 (which refers only to disabilities not mentioned in section 68) which provides "that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claims," is void as against public policy.

In the view we take of this case, it is unnecessary to consider the latter contention. The crucial question is whether it was within the power of the parties to the insurance contract to make an agreement of this nature. In substance the contract is that, in consideration of the payment of certain assessments, the society will pay to the beneficiary, in case of death of the insured, or to the insured, if he "shall suffer the amputation or severance of an entire hand at or above the wrist joint, or * * * of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, * * * *but not otherwise,*" the sum of $1,500. This is an absolute obligation covering death, and certain specific injuries. These alone are the injuries for which indemnity is definitely provided and which there is a legal duty to pay. Such a contract is valid under the statute of this state which was in effect at the time the contract was made, and in the absence of proof it must be presumed that the statutes of the state of Ohio, where the association is organized, and of the state of Kansas, where the contract was made, are in nowise different. It was argued that the association has no power to provide that claims not falling under the provisions of section 68 may be paid, if approved by the beneficiary board, and that consequently all cases of total disability of whatever nature must be paid. This is a *non sequitur*. The argument goes too far. If the board has no power to distinguish and exclude claims for disabilities other than those described in section 68, it can only be because the society has no power to limit the risks it will carry to disabilities arising from the injuries included in that section. It is obvious that this cannot be the law. To so hold would prevent an association from classifying and limiting the risks which it will contract to indemnify against. The statutes permit and provide for such classification, and the contract here is not invalid.

We find nothing in the statutes or in the constitution and by-laws to prevent the members of this association from agreeing with each other that a portion of the funds

which they contribute may be applied to the relief of members for whose injuries no legal liability exists but for whose distressful situation a fraternal feeling might justify relief. The mere fact that the objects of this benevolence are to be selected by a special board from among the members is not important. Many benevolences are created by the contributions of many individuals to a benevolent fund, which it is agreed, either expressly or impliedly, shall be disbursed by a board or committee to whom applications for relief are made. *Pool v. Brotherhood of Railway Trainmen,* 143 Cal. 650.

Deceased became a member knowing the limitations of the insurance contract. It has not been changed since he became a member, and he, as well as all other members, became bound by the mutual agreement. The disability upon which the action is based is not embraced within the provisions of the contract.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

CHARLES DILLEY V. STATE OF NEBRASKA.

FILED MARCH 13, 1915. No. 18,768.

1. **Criminal Law:** MOTION FOR CONTINUANCE: COUNTER SHOWING. Since the enactment of section 7889, Rev. St. 1913, it is proper to allow a counter showing to be filed against a motion for continuance.
2. ———: APPEAL: REFUSAL OF CONTINUANCE. A judgment will not be reversed by the supreme court on account of the refusal to grant a continuance unless there has been an abuse of a sound legal discretion by the district court.
3. **Shooting with Intent to Wound:** SUFFICIENCY OF EVIDENCE: INSTRUCTION: MENTAL RESPONSIBILITY. Evidence examined, and *held* to support the verdict, and that, when considered in connection with instruction No. 11, the question of defendant's mental responsibility was properly submitted to the jury by that instruction.

ERROR to the district court for Dawes county: RALPH W. HOBART, JUDGE. *Affirmed.*

Fisher & Rooney, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

LETTON, J.

Plaintiff in error, hereinafter termed the defendant, was convicted of shooting with intent to wound, which judgment he seeks to review. The facts seem to be that on July 28, 1914, the defendant became engaged in an altercation with one Munkres, a barber, at the latter's place of business at Chadron, Nebraska. Munkres put him out of the barber shop, slapped him and kicked him. About 10 or 15 minutes afterwards, when Munkres was in the back part of the barber shop, the defendant came to the front door and shot at him through the screen door four times, one of the bullets striking him in the hip and passing through the groin. Defendant was arrested in the alley at the back of the barber shop a few minutes afterwards and placed in the county jail. At that time, and while under the impression that he had not wounded Munkres, he said that he wished he had hit him. On August 4 an information was filed containing a count charging shooting with intent to kill, and another count charging shooting with intent to wound. On the same day, without objection, the cause was set for trial on August 10. On that day defendant filed a motion for continuance on the ground: (1) That one Dickenson, who had left the state, would testify that he saw the plaintiff kicked and otherwise abused by Munkres before the shooting; and (2) that, if given time, he could procure the testimony of witnesses in South Dakota to the effect that he was a dipsomaniac for a long time prior to the date of the offense, that he was for a long period of time incapable of judging right from wrong, and was a constant user of intoxicating liquors. A counter showing was filed, and the motion for a continuance was overruled. This is assigned as error.

The state admitted in open court that Dickenson, if present, would testify as stated in the affidavit, and other witnesses testified in open court as to the assault upon defendant before the shooting. At the trial defendant also proved that he had been addicted to the use of intoxicating liquors, had taken a liquor cure some time before, and that he had been drinking heavily a short time before the shooting took place. It was also shown that he had left South Dakota more than a year before that time. It is also said that the trial court erred in permitting a counter showing to be filed, and a number of early cases in this court are cited to this effect. Counsel evidently has overlooked the subsequent adoption of section 7889, Rev. St. 1913, allowing the filing of such a counter showing, and providing as to continuances: "No reversal of such cause or proceeding by the supreme court shall be had on account of the action of the court in granting or refusing such application, except when there has been an abuse of a sound legal discretion therein by the lower court." No abuse of legal discretion occurred. These assignments are not sustained.

The remaining complaints are that the court erred in refusing expert testimony offered on the question of insanity, in failing to instruct upon that question, and that there is no evidence contradicting the testimony of defendant that he was insane when the offense was committed.

The defendant's testimony is that Munkres kicked him in the stomach, and that this caused such pain and terror on his part that he did not remember anything that took place from that time until he was arrested a few minutes after the shooting. The evidence is conflicting as to what part of his body was kicked, and it also shows that after the assault he walked a distance of about a block to his room and procured the revolver with which the shooting was done. It is also shown that when he was arrested, 10 or 15 minutes afterwards, he seemed to have full possession of his faculties.

A number of the questions propounded to the medical expert and excluded did not properly reflect the evidence.

He was permitted to answer others, and did testify that such a lapse of memory might occur from excessive alcoholism.

Considering the evidence in connection with instruction No. 11, we think the question as to the responsibility of the defendant for his actions was properly submitted to the jury by that instruction. We are satisfied also that the jury gave proper weight to defendant's testimony as to his evanescent lapse of memory as tending to throw light upon his mental condition.

We find no prejudicial error and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., not sitting.

ALICE FITZGERALD, ADMINISTRATRIX, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17,969.

1. **Negligence**: QUESTIONS FOR JURY. Issues of negligence and contributory negligence are questions for the jury, where the evidence is sufficient to sustain a verdict in favor of plaintiff.
2. **Street Railways**: STREET INTERSECTIONS: RIGHTS OF DRIVER OF VEHICLE. At a street intersection the driver of a vehicle may attempt to cross a street railway track ahead of an approaching car, where he is justified in believing there will be sufficient time to do so, if the car is operated at its usual and ordinary rate of speed.
3. ———: ———: COLLISION: INSTRUCTIONS. In an action to recover from a street railway damages for negligently running into a vehicle at a street intersection, the case may be submitted in the double aspect of permitting the jury to find whether defendant failed to exercise ordinary care in controlling the speed of the car, or to find whether the motorman, after discovering the peril of the driver, failed to use ordinary care to avoid a collision, where those issues are raised by pleadings and contested by proofs.
4. **Witnesses**: REDIRECT EXAMINATION. Error cannot be predicated on rulings permitting answers to questions properly propounded to

plaintiff's witnesses on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witnesses on cross-examination.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell,* for appellant.

Smyth, Smith & Schall, contra.

ROSE, J.

The action is one to recover damages in the sum of $10,000 for alleged negligence resulting in the death of Michael Fitzgerald. Defendant operates a street railway in Omaha, and with double tracks occupies a strip 15 feet wide in the center of Farnam street, a public thoroughfare running east and west with a paved roadway 42 feet in width. On the north track the cars run west, and on the south track they run east. Thirty-eighth avenue crosses Farnam street at right angles. Fitzgerald, seated in the county ambulance, May 27, 1911, drove a team of horses northward on the east side of Thirty-eighth avenue. After the horses had crossed the street railway tracks on Farnam street the ambulance was struck by a west-bound street car. Fitzgerald was thrown to the pavement and was fatally injured. His widow, as administratrix of his estate, is plaintiff. She pleaded that defendant ran the car at a negligent rate of speed, and failed to exercise ordinary care to avoid a collision after her husband's peril had been discovered. Defendant denied that it was guilty of the negligence charged, and pleaded contributory negligence on the part of the driver of the ambulance. The jury rendered a verdict in favor of plaintiff for $5,000, and from a judgment for that sum defendant has appealed.

Error in refusing to direct a verdict for defendant is the first assignment presented. It is asserted that the evidence is insufficient to show actionable negligence of the motorman. It is also urged that the accident was caused by the negligence of the driver of the ambulance. In this con-

nection it is insisted that the car was approaching Thirty-eighth avenue at a lawful rate of speed; that the horses turned to the right in the intersection, indicating a purpose on the part of the driver to go east on Farnam street without crossing the tracks, but that, instead of doing so, he drove northward in front of the approaching car when a collision was inevitable, though he could have seen and heard the car had he looked and listened; that the gong was sounded; that the car was under control; and that it was stopped at the point of impact. There is some proof tending to support the theory of defendant, but its conclusions are not unavoidable deductions from the evidence and the law. There were several eyewitnesses. The ambulance attracted attention. It was a heavy vehicle with a red cross on the sides of the cover. The motorman recognized it as the county ambulance. When it appeared in the intersection two automobiles and a wagon, which had approached from the west on the south side of Farnam street, were stopped to let it pass. The occupant of the wagon testified that the ambulance passed within about six feet of him; that the horses came into the intersection on a slow trot, without showing an inclination to turn east, and went straight north; that they did not stop as they passed over Farnam street; and that their gait at the time of the collision was the same as when they entered the intersection. Occupants of the automobiles testified to the facts as they observed them. The testimony of the witnesses mentioned and of others tends to prove the following facts: As Fitzgerald reached Farnam street he leaned forward and looked eastward, when the approaching car was 140 feet or more east of Thirty-eighth avenue, but could not see it because his view was obstructed by an east-bound car. The motorman watched the ambulance while his car ran 150 feet. The collision occurred in the intersection near the center line of Thirty-eighth avenue. Testimony tending to prove the facts thus narrated is believable. According to the testimony of the motorman he approached the crossing at a speed of 10 or 12 miles an hour, and he applied the brakes, reducing the rate to 8

or 9 miles an hour after he saw the ambulance, but released the brakes because, as he asserted, the horses veered to the east—a contradicted statement. These estimates of speed, however, are not necessarily conclusive. The horses were trotting when they came into the intersection, and there is proof that the gait was not changed until they had crossed the tracks while going north without deviation. In *Harris v. Lincoln Traction Co.*, 78 Neb. 681, Commissioner Duffie said: "It is common knowledge that horses in a trot move at the rate of about 7 miles to the hour or 10 feet to the second." Whatever may have been the speed of the horses driven by Fitzgerald, it may fairly be inferred from evidence in the present case that the car, after the motorman had seen them approaching the track at right angles, exceeded his estimated speeds, and that it ran more than three times as far as the horses trotted before it reached the place where the collision occurred. Triers of fact are not compelled, as a matter of law, to disregard such inferences or to accept as verity the estimates of the alleged wrongdoer. Besides, when the reciprocal rights and duties of the street car company and the driver of the ambulance at public crossings are considered, with their relative situations and their obvious movements, a speed of 10 or 12 miles an hour may be evidence tending to show negligence. The car was running up grade. The motorman ran at least 150 feet while watching the ambulance. With the car that distance from the crossing, and with the heads of the horses within perhaps 30 feet of the track on which the car was running, it cannot be said, as a matter of law, in view of all the circumstances of which there is proof, that defendant was not guilty of actionable negligence, or that the driver of the ambulance was chargeable with contributory negligence. As a matter of right, a motorman who at the distance of 150 feet sees a team on a trot, 30 feet from a crossing, approaching the track at right angles, cannot maintain his speed until a collision is inevitable. *McKennan v. Omaha & C. B. Street R. Co., ante,* p. 281; *Kennedy v. Third Avenue R. Co.*, 52 N. Y. Supp. 551.

In *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209, the following language was used: "Whatever the rule in some states may be with respect to the rights of pedestrians and street cars upon the streets of a city, the law in this state is settled that neither the street car nor the pedestrian has any priority or privileged right over the other; that an electric street railway company and an ordinary traveler upon the street are required to observe an equal degree of care to prevent accidents, and that neither has a right of way superior to that of the other."

In *Omaha Street R. Co. v. Mathiesen*, 73 Neb. 820, it was said: "If the driver of a vehicle who arrives at a street intersection and who sees an approaching car is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question is a question of fact for the jury, to be determined from all the evidence before it. What an ordinarily prudent and cautious person would do under like circumstances is peculiarly a question for the jury."

In the present case the issues of negligence and contributory negligence were questions for the jury. In *McGahey v. Citizens R. Co.*, 88 Neb. 218, the opinion reads: "The court therefore was justified in submitting the cause in a double aspect; that is to say, to permit the jury to find whether the defendant was negligent in failing to exercise reasonable care to control the speed of its car at the time of and shortly preceding the accident, or to find whether the motorman, after discovering the plaintiff's perilous situation, brought about possibly by his own negligence, failed to use ordinary care to avert the accident."

The first assignment of error is overruled.

Rulings in giving and in refusing instructions are criticised, but, if there has been no mistake in what has been said already in regard to the evidence and to the law applicable thereto, there is no prejudicial error in the charge or in the refusal to give requested instructions.

Defendant also complains of assigned error in permitting witnesses to answer the following questions:

"From what you observed from the position of the car, and of the position of the wagon as it approached to cross the west-bound track, did it, or did it not appear to you—how did it appear to you as to whether or not the driver would have time to cross before the car struck him?"

"And you say that at that time when he looked that he could not see the west-bound car because the east-bound car cut off his view; is that right?"

These questions were propounded to plaintiff's witnesses on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witnesses on cross-examination. For this reason, objections to the questions quoted were properly overruled.

There is no prejudicial error in the record, and the judgment is

AFFIRMED.

A. G. DAVIS COMPANY, APPELLEE, V. EMMA H. HOLMES, APPELLANT.

FILED MARCH 13, 1915. No. 18,020.

Mechanics' Liens: FORECLOSURE: CROSS-PETITION: FINDINGS. Where defendant, in a suit to foreclose a mechanic's lien, files a cross-petition for damages resulting from a fire negligently started by plaintiff, findings that "the defendant is not entitled to recover upon her cross-petition" and that "defendant take nothing by her cross-action" dispose of the issues of fact raised by the cross-petition and answer thereto.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, for appellant.

Burr, Greene & Greene, contra.

ROSE, J.

Plaintiff commenced this action to foreclose two mechanics' liens for painting and repairing defendant's dwelling-house in the city of Lincoln, the amount of one lien being $225, and of the other $12.15. Defendant filed a cross-petition demanding $2,000 in damages alleged to have been caused by fire negligently started by plaintiff's workmen. Upon a trial the district court foreclosed plaintiff's liens and dismissed the cross-petition. Defendant has appealed.

For the purposes of review the cross-demand of defendant is the only matter in controversy. She insists that the evidence shows the fire was caused by the negligence of plaintiff's employees and that therefore she is entitled to recover resulting damages. The trial court found that "the defendant is not entitled to recover upon her cross-petition," and ordered that "the defendant take nothing by her cross-action." The evidence justifies the conclusion reached by the trial court.

There is no error in the record, and the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

THOMAS J. BROWN V. STATE OF NEBRASKA.

FILED MARCH 13, 1915. No. 18,671.

1. **Larceny: POSSESSION OF STOLEN PROPERTY: INFERENCE.** In a prosecution for larceny, the jury, in determining the inference to be drawn from the possession of recently stolen property, should consider whether accused kept and sold it openly, where there is proof of that fact.

2. ———: ———: **INSTRUCTION.** In a prosecution for larceny, an instruction referring directly to defendant's possession of stolen property, and requiring the jury to consider it carefully, where there is nothing else from which the guilt of defendant could be inferred, should likewise call attention to proof, if any, that he kept and sold the property openly.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

Walcott & Walcott and *Allen G. Fisher,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

ROSE, J.

In a prosecution by the state in the district court for Cherry county, Thomas J. Brown, defendant, was convicted of stealing seven cows belonging to Thomas Byron, and for that offense was sentenced to serve in the penitentiary a term of not less than one nor more than ten years. As plaintiff in error he now presents for review the record of his conviction.

Defendant was formerly convicted of the same offense, but his sentence was set aside for error in the proceedings. The circumstances relating to the loss of the cows and to defendant's possession thereof several months later are narrated at some length in the former opinion and need not be restated here. *Brown v. State,* 88 Neb. 411. In reviewing the record of the first conviction it was said:

"These cattle had been openly in possession of the defendant for about six months. There was therefore little, if any, presumption of guilt from the possession of the stolen property."

In the present record there is no evidence to sustain the conviction, unless the guilt of defendant may be inferred from his possession, which he and his witnesses explained as follows: In November, 1909, a man from Marsh Lake, giving the name of W. M. Hammers, came to defendant's house and asked for dinner. During the meal Hammers mentioned that he was driving the cattle to Valentine to market. After dinner they were sold to defendant. On the night of the arrest defendant drove home from Arabia to inform his wife and to get a book in which he had written the name of the seller. He did not go into the house because his wife, who was sick, had gone to sleep. The book

was produced at the first trial, but had been lost before the second. The cows described in the information were branded, but defendant did not know what the brand was. They were kept with his own cattle in an open pasture crossed by two roads. His wife testified that he bought the cows, but her previous statements indicated that she did not know about the sale. Another witness stated that a man with a bunch of cattle turned into defendant's place early in November, 1909. After defendant's possession had been thus explained, witnesses for the state testified there was no one named Hammers at Marsh Lake or in that vicinity. With defendant's possession explained in the manner indicated, the trial court gave the following instruction:

"You are instructed that the possession of stolen property recently after the larceny thereof, when unexplained, may be sufficient to warrant a jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a question of fact exclusively for the jury. In this case you should carefully consider the evidence of the state as to the defendant's possession of the stolen property, the length of time he had such possession, his explanation of the way he came into possession of the cows, as well as all the other evidence in the case, and then draw such inference therefrom as you may be convinced the evidence warrants."

Though there was no direct evidence that defendant had stolen the cows, the instruction refers directly to his possession—the only circumstance from which his guilt could be inferred—and directs the jury to consider it carefully, without making any direct reference whatever to evidence that he had kept and sold the animals openly. The law is that the jury, in determining the inference to be drawn from the possession of recently stolen property, should consider whether accused kept and sold it openly, where there is proof of that fact. *State v. Fitzgerald*, 72 Vt. 142. An instruction referring directly to possession and requiring the jury to consider it carefully, where there is nothing else from which the guilt of accused can be inferred, should

likewise call attention to proof, if any, that he kept and sold the property openly. In this respect at least the instruction cannot be approved.

Considering that there is no direct evidence of the guilt of defendant, that a considerable time elapsed before the missing animals were found in his possession, that he testified to having purchased them from a stranger, that he openly kept and sold them, and that he is entitled to the presumption of innocence, his conviction rests on inference and conjecture too uncertain to satisfy the demands of the criminal law. The weakness of the prosecution was pointed out in the former opinion. It was not materially strengthened when the case was retried. For these reasons, the conviction is set aside and the prosecution is dismissed.

REVERSED AND DISMISSED.

MORRISSEY, C. J., not sitting.

JOHN M. HENRY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED MARCH 13, 1915. No. 18,740.

1. **Appeal:** LAW OF THE CASE. The determination of a question on appeal becomes the law of the case, and will not ordinarily be reexamined on a subsequent appeal in the same case.
2. ———: NEGLIGENCE: CONFLICTING EVIDENCE. In an action for personal injuries, negligence and contributory negligence, where there is a substantial conflict in the evidence, are questions for the jury, and their findings on those issues will not be set aside on appeal unless clearly wrong.
3. **Evidence:** OBJECTIONS: FOUNDATION. In an action for personal injuries caused by electricity, an objection to admitting in evidence, on the ground that no foundation had been laid, an electric switch, may be overruled, where counsel for defendant in the opening statement pointed it out as the identical switch by which plaintiff was injured.
4. ———: CARLISLE TABLE. The Carlisle table of expectancy may be admitted in evidence in the trial of an action for personal inju-

ries resulting in the permanent impairment of plaintiff's earning capacity, age and good condition of health at the time of the injury being shown.

5. **Appeal:** RULING ON EVIDENCE. A judgment will not be reversed on account of a ruling on evidence, where the record shows that appellant was not prejudiced thereby.

6. **Trial:** INSTRUCTIONS. Where instructions as a whole correctly state the law applicable to the evidence, they will not be condemned as erroneous, though an isolated statement might be open to criticism.

7. **Damages.** A verdict for $6,500 in favor of a healthy young man with a good earning capacity, which was permanently impaired at the age of 21, *held* not excessive, where the evidence shows that he suffered pain and anguish from an electric burn resulting in a severe shock and in the loss of the thumb and the index finger of his left hand.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Fred C. Foster and *D. H. McClenahan,* for appellant.

W. B. Comstock, contra.

ROSE, J.

This is an action by an employee in the water department of the city of Lincoln to recover from his employer damages in the sum of $10,000 for personal injuries sustained September 3, 1908. At that time plaintiff had been in the employ of defendant for a month as a motor-tender at the Rice pumping station near the intersection of Twenty-fourth and N streets. He worked alone at the bottom of a cylindrical pit 50 feet deep and 25 feet in diameter, where two pumps, propelled by electricity were located. Intending to prime one of the pumps, which had lost its suction, plaintiff stepped onto a 12-inch wheel on a perpendicular valve-stem extending a foot or more above the floor of the pit and, by the turning of a similar wheel on the end of a horizontal valve-stem about five feet higher, attempted to open a valve between a water main and the pump. The wheel under him turned and he lost his balance. In attempting to protect himself from a fall, he

threw out his left hand, which came in contact with an electric switch or switch-handle less than three feet from where he had stood. Electric burns resulted in the amputation of the thumb and the index finger and a neuroma followed. In substance the negligence charged, in view of the situation and conditions shown by the petition, consisted in the failure: To warn plaintiff of danger or to instruct him how to avoid injury; to cover, or provide a guard for, the switch; to ground the switch or to connect the trip-coils; to provide sufficient space between the switch and the valve-stems; to furnish sufficient insulation for the switch and the switch-handle; to provide a switch sufficient for 4,400 volts, that amount of electromotive force having been used with a switch designed for 2,500 volts; to provide a covering for the damp floor; to place the upper valve within reach of the floor, or provide proper means for reaching and operating it; to furnish a safe place to work. Defendant in its answer denied negligence, and pleaded the performance of its duties to plaintiff, assumption of risk and contributory negligence. From judgment on a verdict in favor of plaintiff for $6,500, defendant has appealed.

Failure of plaintiff to file with the city clerk a statement of his claim within 30 days from the date of his injury is argued as a ground of reversal, and the city charter is cited to sustain the argument. Rev. St. 1913, sec. 4582. The identical point under the same petition was decided adversely to defendant on a former appeal. *Henry v. City of Lincoln,* 93 Neb. 331. The former ruling is therefore the law of the case and will not now be reexamined. *Bettle v. Tiedgen,* 85 Neb. 276.

The assignment to which the principal argument applies is alleged error in the refusal to direct a verdict for defendant on account of the insufficiency of the evidence to show that the proximate cause of plaintiff's injuries was the actionable negligence of defendant. The question is a perplexing one. The vital issues are complicated by many charges of negligence. The evidence is voluminous and much of it is the testimony of experts on the subjects of

electricity and electrical appliances. The relation of different items of proof to a particular charge of negligence is not always clear. The identical switch of which plaintiff complains was before the trial court and the jury, but it is not in the record for review. Some of the witnesses testified with reference to the switch as it appeared before them. Their testimony may have had a definite import in the trial court, but it is not all intelligible on appeal, in absence of the exhibit to which it relates. There appears, however, to be proof of each charge of negligence, though this is vehemently controverted by defendant. The circumstances and conditions under which plaintiff worked at the bottom of the pit are disclosed. The record contains proof tending to show: As a motor-tender plaintiff was inexperienced. He was not familiar with the danger of electromotive force or with the means of controlling and applying it. The switch or the switch-handle was uncovered and unguarded. It was not grounded. At the time of the injury it was subjected to a test of 4,400 volts, while it was designed for 2,500 volts, the latter having been stamped on the instrument itself by the manufacturer. It was insufficient for so severe a strain, the insulation being impaired and the danger being increased by dampness in the pit. The weather was warm. Water had collected on and dripped from the pipes. The floor was wet and uncovered. The space between the valve-stems and the electric switch was too narrow for safety. The wheel on the perpendicular valve-stem was the only means of reaching the valve above and the latter was too high to be operated from the floor. An experienced motor-tender who worked in plaintiff's absence frequently turned the upper valve while standing on the wheel below. Plaintiff was not warned of existing danger or instructed how to prevent injury. What has been thus said may be deduced from the proofs. The narrative is not intended as a statement of facts. It is meant for a summary indicating the nature of the testimony on which plaintiff relies. All of the proof tending to show actionable negligence is contradicted, but the issues of fact were for the jury and they were deter-

mined adversely to defendant. The conclusion is that the evidence is sufficient to sustain findings that negligence in the use of the electric switch and switch-handle, when considered with the strain to which it was subjected, under all of the circumstances and conditions proved, was the proximate cause of the injury, that plaintiff was not guilty of contributory negligence, and that he did not assume the risk of the injuries inflicted. It follows that there was no error in refusing a peremptory instruction for defendant.

Another assignment challenges a ruling admitting the electric switch in evidence. The objection at the trial was: "No foundation laid." This objection was properly overruled because counsel for defendant had, in his opening statement to the jury, pointed to the switch as the identical one described in the petition.

It is also contended that the trial court erred in admitting in evidence the Carlisle table showing the expectancy of life at the age of 21. Plaintiff was not quite that old when injured. His good health was shown. There was evidence that his earning capacity was permanently impaired by his injuries. These are circumstances under which tables of expectancy are admissible.

There were also objections to rulings on evidence relating to the character and the use of the switch and to plaintiff's earning capacity before and after the injury, but in these respects error is not affirmatively shown.

The following instruction is challenged as erroneous: "You are instructed that the burden of proof in this case is upon the plaintiff to prove, by a preponderance of the evidence, all the material allegations in his petition. That is to say, that, at the time of the accident alleged, the defendant was guilty of negligence, as stated in the petition; that, as the proximate result of such negligence, the plaintiff sustained injuries, as alleged in the petition, and, by reason of said injuries, the plaintiff has been damaged, as alleged in the petition, and the amount of such damages. When the plaintiff has shown these facts, then the burden of proof is upon the defendant to prove, by a preponderance of the evidence, the allegations of its answer, con-

stituting its defense to plaintiff's action. That is to say, that any injuries received by the plaintiff were the proximate result of his own negligence, or that his own negligence contributed thereto, as a proximate cause thereof."

The principal criticisms are: "This instruction shifts the burden of proof and requires the defendant to prove the allegations of its answer, regardless of whether the plaintiff, by his pleadings and evidence, showed that he was guilty of contributory negligence. It also requires the defendant to establish its freedom from negligence by a preponderance of the evidence."

When the entire charge is considered, the instruction is not open to the objections urged.

Another instruction contains the following language: "It is also a general rule of law that, where both parties are in the wrong, no liability arises. That is to say, even though you should find the defendant negligent, as alleged in the petition, yet if you should further find that the plaintiff's own negligence also contributed as the proximate cause of the injury sustained, then in such case no liability would arise against the defendant."

Another part of the charge reads: "You are instructed that the burden of proving negligence rests upon the party alleging it, and where a person charges negligence on the part of another as a cause of action he must prove the negligence, by a preponderance of the evidence, and in this case, if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant."

The charge as a whole required the jury to find, as conditions of the right of plaintiff to recover, that negligence pleaded by him was established by a preponderance of the evidence and was the proximate cause of his injuries. When the instructions are properly interpreted, the jury were not permitted to find for plaintiff if he was guilty of contributory negligence. The burden of proving that defense was not placed on defendant, unless the allegations of the petition were established. In view of what has been said

in regard to the evidence, there is no prejudicial error in the giving or refusing of instructions.

The recovery is vigorously assailed as excessive, but a substantial reason for setting aside the verdict on this ground has not been suggested. Plaintiff was a minor in good health when his hand was burned. He was shocked and his injuries were distressing. He had a good earning capacity, which was permanently impaired. He lost the thumb and the index finger of his left hand. In the cicatrix there was a sensitive neuroma at the time of the trial. To remove it would require an operation. The utility and beauty of a perfect human hand represent the activity and development of the race. The hand protects other parts of the body. Its movements respond to the will and add grace and charm to oral expression. By a caress the hand may communicate the impulses of the heart to others. When it becomes repulsive by a deformity it may produce mental anguish—an element of damage. On appeal it is difficult to determine how much the jury may properly award for pain and suffering and other indefinite, though substantial, elements of recovery. Interference with a verdict as excessive must rest on substantial grounds.

No prejudicial error has been found, and the judgment is

AFFIRMED.

BARNES, J., dissents.

LETTON, J. I believe the recovery should not exceed $4,500.

W. F. H. ARMSTRONG, TRUSTEE, ET AL., APPELLEES, V. DAVID C. PATTERSON, APPELLANT.

FILED APRIL 3, 1915. No. 17,884.

Limitation of Actions: DOMESTIC JUDGMENTS. A domestic judgment is a specialty within the meaning of section 10 of the code (Rev. St. 1913, sec. 7567), and an action thereon is barred by the statute

of limitations after five years from the date of the judgment. *Snell v. Rue*, 72 Neb. 571, overruled.

REHEARING of case reported *ante*, p. 229. *Former judgment of affirmance vacated and judgment of district court reversed and action dismissed.*

T. L. Norval and *M. O. Cunningham* appeared on rehearing as additional counsel, *amici curiæ*.

SEDGWICK, J.

Our former opinion in this case *ante*, p. 229, followed *Snell v. Rue*, 72 Neb. 571, reluctantly, to be sure, but under the impression that "to establish such a limitation now would be legislation, and is not within the province of the courts." A rehearing was had, and we have been greatly assisted by eminent counsel as well as by the defendant himself. It appears that in *Snell v. Rue, supra*, the contention was that actions on domestic judgments were limited by section 16 of the code: "An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued." Code, sec. 16. Whether a domestic judgment is a specialty within the meaning of section 10 of the code was not much considered. In the opinion it is said: "Where the right of enforcement of a judgment by execution still exists after the bar which it is claimed the statute interposes to an action has taken effect, the bar is of no avail so far as preventing the collection of the debt is concerned. Hence the statute fails of its purpose as a statute of repose. We cannot believe that the legislature intended to fix such a short time (four years) within which an action upon a domestic judgment might be maintained, and at the same time leave the judgment open to enforcement by execution." This appears to be the only point that was insisted upon or presented in the brief of counsel in that case. The court, by way of argument, referred to *Tyler's Ex'rs v. Winslow*, 15 Ohio St. 364, with apparent approval, but not with the purpose of deciding whether such judgment is a specialty. In our former opinion herein, it was suggested

that *Tyler's Ex'rs v. Winslow* had since been greatly discredited, if not overruled, by later decisions of that court, and we affirmed the judgment of the district court because it appeared that our former decision had been followed, and under the supposition that greater harm would come from overruling *Snell v. Rue* than would ensue from upholding it until the legislature could establish a more reasonable rule. There seems to be some inconsistency in providing by statute that an action on a domestic judgment is barred in five years, and that it may nevertheless be revived and enforced at any time within ten years. But this inconsistency is not so great as to provide that there is no limitation, and that an action can be maintained thereon when it has been dormant for a length of time "whereof the memory of man runneth not to the contrary." We are, upon further consideration, convinced that the legislature never intended to remove all limitations of such actions, and that such judgment must be regarded as a specialty within the meaning of section 10 of the code (Rev. St. 1913, sec. 7567). *Snell v. Rue,* 72 Neb. 571, is overruled.

Our former judgment is vacated, and the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

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21. The giving of an instruction containing an inaccurate explanation of terms correctly used therein is not ground for reversal, where it does not mislead the jury. *Usher v. American Smelting & Refining Co*..... 526

22. An error in defining "fellow servant" is immaterial, where the undisputed evidence shows that such relation did not exist and the jury so find. *Wenquist v. Omaha & C. B. Street R. Co*..... 554

23. A judgment on conflicting evidence will not be reversed for inadequacy in amount, where the jury were properly instructed on the measure of damages. *Calbreath v. Bamford* 830

24. A judgment sustained by the pleadings and evidence will be affirmed. *Campbell v. Hobbs* 833

25. A judgment will not be reversed for nonprejudicial rulings on evidence. *Henry v. City of Lincoln* 865

26. Findings of fact on conflicting evidence will not ordinarily be set aside. *DeNoon v. Lincoln Traction Co*..... 1

27. Findings of a jury will not be disturbed where the evidence is conflicting. *Kohl v. Munson* 170

28. A verdict on conflicting evidence will not be set aside unless manifestly wrong. *Haight v. Omaha & C. B. Street R. Co*.. 293
Langdon v. Withnell 335
Williams v. Western Travellers Accident Ass'n 352
Olson v. Farnsworth 407

Appeal and Error—*Concluded.*

Fourth Nat. Bank v. Rutherford 697
Haar v. Howard 761

29. A verdict on conflicting evidence will not be disturbed, unless the whole record shows it to be clearly wrong. *Weber v. Towle* 233

30. A verdict not clearly wrong on the questions of fact will be sustained. *Wenquist v. Omaha & C. B. Street R. Co*..... 554

31. A verdict will not be set aside as unsupported by the evidence, unless clearly wrong. *Nofsinger v. Paup* 599

32. A verdict sustained by substantial evidence will not be disturbed unless clearly wrong. *Davis v. Manning* 658

Arbitration and Award. See COUNTIES AND COUNTY OFFICERS, 5.

1. An arbitration award given to one of the arbitrators for delivery *held* binding, though not delivered but produced in court on an order therefor. *Hughes v. Sarpy County* 90

2. An arbitration award *held* not void for want of notice of a meeting of the arbitrators to view the premises, where no hearing was contemplated. *Hughes v. Sarpy County* 90

3. Submissions of controversies to arbitration will be liberally construed to give effect to the intention of the parties. *Hughes v. Sarpy County* 90

4. The burden of proof is on the party seeking to impeach an arbitration award. *Hughes v. Sarpy County* 90

Assault and Battery. See LIMITATION OF ACTIONS, 4.

1. Evidence *held* insufficient to sustain a conviction of assault. *Fink v. State* 5

2. Instruction defining assault *held* proper. *Mauder v. State* 380

3. An instruction on what constitutes the offense of assault *held* not prejudicial. *Mauder v. State* 380

4. The rule that where the victim in good faith withdraws from a mutual combat, and is afterwards assaulted, he may recover damages, does not apply where the party assaulted strikes his assailant immediately on escaping from the attack. *Eisentraut v. Madden* 466

5. Plaintiff cannot recover for an assault and battery where he was the aggressor, unless defendant used more force than was necessary. *Nofsinger v. Paup* 599

6. Evidence *held* to sustain a conviction of shooting with intent to wound. *Dilley v. State* 853

Attorney and Client.

Where an attorney agrees upon his compensation for a specified service, he cannot ordinarily contract for greater compensation for such service while the service is being rendered. *Olson v. Farnsworth* 407

Bankruptcy.

1. An act of fraud, embezzlement, misappropriation or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it while acting as an officer or in a fiduciary capacity. *Martin v. Starrett* 653
2. The managing partner of a firm composed of two members is not an "officer," within sec. 17 of the bankruptcy act of 1898. *Martin v. Starrett* 653
3. The term "fiduciary capacity," as used in sec. 17 of the bankruptcy act of 1898, applies to technical trusts, and not to those arising by implication of law. *Martin v. Starrett* 653
4. During the existence of a partnership formed to conduct a banking business, the managing partner does not act "in any fiduciary capacity," within sec. 17 of the bankruptcy act of 1898. *Martin v. Starrett* 653

Bastardy.

1. Where complainant's evidence was, by agreement, taken in shorthand, and transcribed and certified by the magistrate, an objection that it was not reduced to writing by the magistrate, *held* properly overruled. *Newman v. Dovey* 624
2. An objection to the complaint filed before the birth of the child, that it did not state that the child was born alive, should be overruled. *Newman v. Dovey* 624

Bills and Notes.

1. In an action by one party to a note against another to recover the one-half of the debt paid by plaintiff, parol evidence is admissible to show the capacity in which they signed the note. *Cox v. Ellsworth* 392
2. Instructions as to plaintiff's right to recover on a note *held* not prejudicial. *Cox v. Ellsworth* 392
3. Evidence, in an action on a note, *held* to show that defendant did not sign the note, and that plaintiff was not a *bona fide* purchaser. *Powell v. Deuchler* 296
4. Where a negotiable note is purchased after maturity from an innocent holder, the purchaser takes it free from equities and defenses between the original parties. *Douglass v. Burton* 483

Bills and Notes—*Concluded.*

5. Where the uncontradicted evidence shows that plaintiff purchased a note sued on after maturity from an innocent holder, the court should direct a verdict for plaintiff. *Douglass v. Burton* 483
6. Where defendant pleads total failure of consideration for a note, and proves only partial failure, *held* not error to refuse to submit that defense. *Aegerter v. Ronspies* 656

Brokers.

1. Where the owner lists personalty with several agents, giving no one an exclusive agency, the agent effecting the sale is entitled to the commission. *Goodwin v. Haller* 209
2. Evidence, in an action for commission, *held* to sustain verdict for plaintiff. *Goodwin v. Haller* 209

Burglary.

1. Evidence *held* insufficient to sustain a conviction of burglary. *Hayward v. State* 9
2. Under sec. 8643, Rev. St. 1913, to prove burglary, there must be evidence of an unlawful breaking and entry with felonious intent. *Hayward v. State* 9
3. An instruction that, if the jury believed "beyond a reasonable doubt" that the accused entered the building without unlocking the door, or without using force, they should acquit him, *held* erroneous. *Hayward v. State* 9
4. In a trial for burglary, an instruction containing the clause, "although the entry might have been effected through a door already open," *held* erroneous for ambiguity. *Hayward v. State* 9

Carriers. See NEGLIGENCE, 10, 11.

1. A street railway company must exercise greater care in transporting children than in transporting adults. *Dore v. Omaha & C. B. Street R. Co* 250
2. It is not negligence, as a matter of law, for a child of seven, after signaling a street car to stop, to leave his seat and stand in the doorway. *Dore v. Omaha & C. B. Street R Co*... 250
3. It is not such contributory negligence as will preclude recovery for injuries, for a passenger to stand on the front step of a crowded street car while in motion. *Kadner v. Omaha & C. B. Street R. Co* 678
4. Permitting passengers to stand on platforms and steps of an overloaded street car *held* evidence of negligence. *Kadner v. Omaha & C. B. Street R. Co* 678

Carriers—*Concluded.*

5. A person standing on the steps of a moving street car, not being able to secure a seat or standing room within, is presumed to be there with the consent of those in charge of the car. *Kadner v. Omaha & C. B. Street R. Co* 678

6. Under the evidence, in an action for injuries from being thrown from a crowded street car, *held* that the questions of negligence and contributory negligence were for the jury. *Kadner v. Omaha & C. B. Street R. Co* 678

Chattel Mortgages.

1. A bill of sale, purporting on its face to convey the property absolutely, may be shown to have been given as security only. *Weber v. Towle* 233

2. In determining whether a bill of sale was given as security, evidence as to whether the debt was canceled and the evidence thereof surrendered when the bill of sale was made is material. *Weber v. Towle* 233

3. Whether a bill of sale was given as security for a debt *held*, under the evidence, a question for the jury. *Weber v. Towle* 233

Compromise and Settlement.

1. A *bona fide* dispute as to the amount due on an account is a sufficient consideration to uphold a settlement thereof. *Hileman v. Maxwell* 14

2. Where an insurer fraudulently secures the indorsement of a check containing a receipt in full, the receipt is no defense to an action on the policy. *Williams v. Western Travelers Accident Ass'n* 352

Conspiracy.

A mere tacit understanding between conspirators to work to a common unlawful purpose is all that is essential to a guilty combination. *Deupree v. Thornton* 812

Constitutional Law.

1. Ch. 178, laws 1909, authorizing Sherman county to pay for articles purchased when there was no money in the county treasury to pay for same, *held* not unconstitutional. *Gibson v. Sherman County* 79

2. Ch. 178, laws 1909, authorizing Sherman county to pay for articles purchased under an invalid contract, *held* not void as an exercise of judicial power. *Gibson v. Sherman County* 79

3. Ch. 63, laws 1911, pertaining to bawdy-houses, except possibly secs. 5 and 8, *held* valid. *State v. Fanning* 224

Constitutional Law—*Concluded.*

4. The constitutionality of the "Slocumb Law" (Rev. St. 1913, ch. 40) having been often passed upon will not be re-examined, where no special reason for its unconstitutionality was assigned. *Yechout v. Tesnohlidek* 387

5. Ch. 47, laws 1883, requiring innkeepers to provide for the safety of guests, *held* constitutional. *Strahl v. Miller* 820

Contempt.

1. The affidavit in a contempt proceeding is jurisdictional. *Belangee v. State* 184

2. An affidavit alleging material facts on information and belief will not give a court jurisdiction of a contempt proceeding. *Belangee v. State* 184

3. Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts. *Belangee v. State* 184

Continuance. See CRIMINAL LAW, 29, 30.

The absence of a witness is not ground for a continuance, where his testimony would be inadmissible under the issues. *Aegerter v. Ronspies* 656

Contracts. See GAMING.

1. A certain contract *held* to be a contract by defendant to "order all the material and superintend all the work," for a building, and not to be an ordinary building contract. *Sharp v. National Fidelity & Casualty Co* 41

2. Evidence, in an action on a building contract, *held* to sustain a finding that the principal delays in construction were due to the owner's acts. *Sharp v. National Fidelity & Casualty Co* 41

3. A contract for personal services is usually dissolved by the death of either party. *Homan v. Redick* 299

4. Where a contract is so far personal that the representative of one party is not liable for nonperformance, the representative of the other party is not liable for a like failure. *Homan v. Redick* 299

5. Where A employed B to manage property and collect rents, the fact that A's executors permitted B to manage the property and collect rents for some time after the death of A did not constitute a ratification of the contract. *Homan v. Redick* 299

Contracts—*Concluded.*

6. Where defendant, by misrepresentations, induced plaintiff to deed him land for land of far less value, equity will grant relief. *Buchanan v. Wilson* 369
7. Where plaintiff, though not wholly insane, was in such weak mental condition as to enable defendant to take advantage of him in an exchange of lands, *held* that plaintiff could rescind the contract and recover his property. *Buchanan v. Wilson* 369
8. A stipulation that the contractor will provide all material and perform all the work constitutes a promise to satisfy lawful claims of mechanics and laborers. *Sailling v. Morrell* 454
9. Where an agreement was indefinite, *held* that, under sec. 7909, Rev. St. 1913, that construction should prevail which plaintiff had reason to suppose defendant understood it to have. *Campbell v. Hobbs* 833

Corporations.

1. A contract pertaining to a corporation's business, executed in its name by its president, will be presumed to have been authorized. *Omaha Wool & Storage Co. v. Chicago G. W. R. Co.* 50
2. After forfeiture of charter under ch. 25, laws 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. *Havens & Co. v. Colonial Apartment House Co* 639
3. Sec. 144m, ch. 16, Comp. St. 1909, authorizing dissolved corporations to sue in the corporate name, *held* not to apply to a corporation whose charter has been forfeited under ch. 25, laws 1909. *Havens & Co. v. Colonial Apartment House Co.* 639

Counterclaim. See SET-OFF AND COUNTERCLAIM.

Counties and County Officers. See CONSTITUTIONAL LAW, 1, 2. LIMITATION OF ACTIONS, 1, 2. TAXATION, 1.

1. A county treasurer is not liable on his bond for interest which he has been unable to collect, unless collection has been prevented by his negligence. *Furnas County v. Evans* 54
2. Where a county has recognized its moral liability for property obtained under an invalid contract, its allowance by the county board will not be set aside at the instance of a taxpayer. *Gibson v. Sherman County* 79

Counties and County Officers—*Continued.*

3. Where the record on appeal from the allowance of a claim by the county board shows that the claim was acted on by the board, failure of the record to show that the claim was filed with the county clerk will not deprive the court of jurisdiction. *Gibson v. Sherman County* 79

4. Formal pleadings are not necessary in presentation of a claim to a county board. *Gibson v. Sherman County* 79

5. County boards have authority to submit matters in dispute to arbitration either under the statute or the common law. *Hughes v. Sarpy County* 90

6. A county treasurer is not liable for the safe-keeping of county funds, including state taxes, deposited by him in a depository bank which has given bond pursuant to ch. 50, laws 1891. *Lancaster County v. State* 95

7. Where a county treasurer is relieved from liability on his bond for loss of funds in a depository bank, the county, in the absence of extraordinary circumstances, is not liable to the state for state taxes included in such funds. *Lancaster County v. State* 95

8. Where a county treasurer mistakenly pays to the state treasurer from county funds an amount equal to state money deposited by the county in a depository bank, and lost through failure of the bank, the county may, under permission of the state senate, recover such money from the state. *Lancaster County v. State* 95

9. An order of the county board *held* not invalid because one of the commissioners had moved into another commissioner district. *Horton v. Howard* 575

10. Bonds for a courthouse voted at a special election *held* not invalid because one of the members of the county board had moved into another commissioner district when the order for the election was passed. *Horton v. Howard* 575

11. Evidence in a suit to enjoin the registration of county bonds *held* to sustain judgment for defendant. *Horton v. Howard* 575

12. Notice of bond election *held* sufficient. *Horton v. Howard*.. 575

13. Under sec. 13, art. XVI of the constitution, and sec. 1955, Rev. St. 1913, *held* that a county commissioner elected in 1912 would hold his office for four years, beginning January, 1913, and his successor would hold for the remainder of the four-year term ending January, 1919. *Calling v. Gilland*.. 788

Counties and County Officers—*Concluded.*

14. Sec. 55, p. 370, laws 1879, as amended by ch. 46, laws 1905, fixes the terms of county commissioners of all counties at four years. *Saling v. Bahensky* 789

15. The general election law in regard to the terms of county officers does not apply where the statute creating the office fixes the term. *Saling v. Bahensky* 789

Courts.

1. In probate proceedings the county court is a court of record, and its judgments are entitled to the presumptions that attach to the records of such courts. *Herter v. Herter* 260

2. While the county court may incidentally determine equitable questions in probate matters, it does not have general equity jurisdiction. *In re Estate of Wilson* 780

Criminal Law. See ASSAULT AND BATTERY, 1, 2, 6. BURGLARY. DISORDERLY HOUSES. INDICTMENT AND INFORMATION. LARCENY. RAPE. RECEIVING STOLEN GOODS. ROBBERY. WITNESSES, 1, 2.

1. Refusal of a cautionary instruction as to the testimony of a sheriff *held* proper. *Hudson v. State* 47

2. An instruction as to malice *held* erroneous. *Jones v. State*.. 151

3. A confession is incompetent in evidence, unless first shown to have been voluntarily made. *Jones v. State* 151

4. An involuntary confession is not competent evidence against the accused for any purpose. *Jones v. State* 151

5. Evidence that the accused has admitted guilt or important facts, if competent, is not admissible in rebuttal, but only as evidence in chief. *Jones v. State* 151

6. In a prosecution for obtaining money by false pretenses, a telegram sent by the drawee bank to the bank cashing the check *held* inadmissible, as hearsay. *Rogers v. State*..... 180

7. Where the record does not affirmatively show any prejudicial error, the judgment will be affirmed. *Black v. State* 273

8. A verdict on conflicting evidence will not be disturbed. *Mauder v. State* 380

9. An instruction that the testimony of any witness who wilfully testifies falsely as to a material fact may be disregarded, and that the credibility of witnesses is for the jury, approved. *Mauder v. State* 380

10. Instruction defining reasonable doubt *held* proper. *Mauder v. State* 380

Criminal Law—*Continued.*

11. Failure to instruct on a lesser offense included in the crime charged *held* not error, where there was no request therefor. *Curtis v. State* 397

12. Where, in a prosecution for robbery, intoxication of the accused was proved, failure to instruct thereon *held* not error, in the absence of a request therefor. *Curtis v. State* 397

13. A verdict of guilty on conflicting evidence will not be set aside unless clearly wrong. *Curtis v. State* 397

14. Where the evidence in the county court is certified to the district court on a petition in error, the supreme court will examine the entire proceeding, and affirm or reverse the judgment of the district court as the law demands. *Cooper v. State* 461

15. A voluntary confession, made before arrest and before an accusation had been made, *held* properly received in evidence. *Shellenberger v. State* 498

16. Where accused was below the average in intelligence, and the evidence, unaided by his confession, would not sustain a conviction, evidence that he had made a false confession of another murder in 1890 was not too remote to be admissible. *Shellenberger v. State* 498

17. A nonexpert witness may give his opinion on the question of sanity, after testifying to the facts on which he bases his opinion. *Shellenberger v. State* 498

18. Error cannot be predicated on the admission of irrelevant testimony, where no motion to strike same was made. *Shellenberger v. State* 498

19. An instruction that defendant's confession, if he made one, is competent evidence to prove his connection with the crime, without qualification, *held* erroneous. *Shellenberger v. State* 498

20. Instructions defining reasonable doubt criticised. *Shellenberger v. State* 498

21. A cautionary instruction as to the evidence of police officers is proper only when the officer is a witness for the state. *Shellenberger v. State* 498

22. Refusal of a requested instruction is not error, where its substance is given in a different form. *Kurpgeweit v. State* 713

23. An instruction that accused is entitled to the presumption of innocence as a matter of evidence *held* not erroneous, when construed with another instruction defining evidence. *Kurpgeweit v. State* 713

Criminal Law—*Concluded.*

24. In a prosecution for larceny, the court may, in its discretion, permit the state to withdraw its rest and prove the ownership of the property. *Kurpgeweit v. State* 713

25. A conviction will not be reversed unless error is affirmatively shown. *Kurpgeweit v. State* 713

26. Receiving stolen property in Nebraska may be prosecuted in this state, though the property was stolen in a foreign state. *Egan v. State* 731

27. Affidavit of a juror, as to misconduct of the jury while deliberating, *held* properly disregarded. *Egan v. State* 731

28. A memorandum of items of money paid is not competent in evidence as a book account. *Egan v. State* 731

29. Under sec. 7889, Rev. St. 1913, a counter showing may be made against a motion for continuance. *Dilley v. State* .. 853

30. A judgment will not be reversed for refusal of a continuance, in absence of abuse of discretion. *Dilley v. State* 853

Damages. See APPEAL AND ERROR, 23. EMINENT DOMAIN, 2. TELEGRAPHS AND TELEPHONES.

1. Testimony of parents of an injured child describing his sufferings, duration of sickness, and habits and conduct before and after the injury, *held* admissible to show the permanence of the injury. *Dore v. Omaha & C. B. Street R. Co.*... 250

2. Exhibition of scars of bodily injuries should not be permitted, unless they furnish evidence material to the issues. *McKennan v. Omaha & C. B. Street R. Co*..... 281

3. Where the measure of damages for breach of a contract of sale of good will is stipulated, the amount agreed on will be enforced, unless so excessive as to constitute a penalty. *Pankonin v. Gorder* 337

4. A verdict for $1,500 for injury to a child *held* not excessive. *Dore v. Omaha & C. B. Street R. Co*..... 250

5. A verdict for $16,000 for permanent injuries to a man 36 years of age *held* not excessive. *Jones v. Chicago G. W. R. Co.* 306

6. A recovery of $5,026 for permanent injuries to a teamster 24 years old *held* not excessive. *Krum v. Sullivan & Schaberg Transfer & Fuel Co*..... 491

7. A verdict of $10,000 for death *held* not so excessive as to justify setting it aside as the result of passion or prejudice. *Craig v. Chicago, St. P., M. & O. R. Co*..... 586

Damages—*Concluded.*

8. Where injuries were not permanent, verdict for $4,000 *held* excessive. *James v. Hayden Bros* 619
9. A verdict for $6,500 for loss of the thumb and index finger of the left hand of a man 21 years old *held* not excessive. *Henry v. City of Lincoln* 865

Death.

1. A presumption of death arises from the continued and unexplained absence of a person for seven years. *McLaughlin v. Sovereign Camp, W. O. W.* 71
2. The presumption of death from absence is that the absentee died during the first seven years, but there is no presumption that his death occurred at any particular time. *McLaughlin v. Sovereign Camp, W. O. W.* 71
3. An insurer cannot avoid its contract for an alleged violation of a by-law adopted during an unexplained absence creating a presumption of the insured's death, where there is no evidence that the insured was living when the by-law was adopted. *McLaughlin v. Sovereign Camp, W. O. W.* 71
4. Where absence of insured for more than seven years is shown, the burden is on the insurer of showing that he is alive. *Rosencrans v. Modern Woodmen of America* 568
5. Evidence of eight years continuous absence *held* to warrant the presumption of insured's death. *Rosencrans v. Modern Woodmen of America* 568

Deeds.

Deposit of a deed in a bank to be recorded after the grantor's death, and the recording thereof after the grantor's death, *held* a sufficient delivery to pass title. *Owings v. First Nat. Bank* 257

Disorderly Houses.

Evidence *held* to sustain a conviction of leasing a house for immoral purposes, and of knowingly permitting the same to be so used. *Cooper v. State* 461

Divorce.

1. Equity will not grant a divorce to a guilty petitioner, though the other party has been more culpable. *Peyton v. Peyton* 663
2. Where the evidence is oral and conflicting, the trial court's conclusion as to the reliability of witnesses will be given great weight. *Peyton v. Peyton* 663

Easements.

Where the use of a way is permissive, and access to it is through a gate under control of another, there is no such adverse right as may ripen into a title by prescription. *Moll v. Hagerbaumer* 809

Ejectment. See JUDGMENT, 8.

1. Plaintiff in ejectment must allege and prove a legal title and right of possession. *Reams v. Sinclair* 542
2. A verdict in ejectment will not be disturbed where the evidence as to adverse possession is conflicting. *Koltermann v. Chilvers* 673

Elections. See COUNTIES AND COUNTY OFFICERS, 10. MUNICIPAL CORPORATIONS, 3. SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

1. Under sec. 2114, Rev. St. 1913, a contestant will be required, on motion, to set out the names of the persons whose votes are alleged to have been illegally received or rejected. *McWhorter v. Schramm* 103
2. A contestant must prove the material allegations in his complaint, though the incumbent has not formally answered. *McWhorter v. Schramm* 103

Eminent Domain. See WATERS, 11.

1. A city ordinance providing for "freeholders" to assess damages from the "opening or alteration" of streets, *held* not to conform to sec. 5133, Rev. St. 1913, providing for the "vacation" of streets. *Jones v. City of Aurora* 825
2. No action taken under a city ordinance not conforming to sec. 5133, Rev. St. 1913, can be pleaded in bar of a property owner's right to sue for damages for vacation of a street. *Jones v. City of Aurora* 825
3. The words "freeholder" and "householder," as used in sec. 5133, Rev. St. 1913, providing for vacation of streets and for election of householders to assess damages, are not synonymous. *Jones v. City of Aurora* 825
4. Where streets are vacated by competent authority, the city must make adequate compensation to abutting property owners whose property is injured thereby. *Jones v. City of Aurora* 825

Equity. See CONTRACTS, 6. COURTS, 2. JUDGMENT, 6. PRINCIPAL AND SURETY, 2. TAXATION, 10.

Estoppel. See WATERS, 5.

Evidence. See APPEAL AND ERROR. ARBITRATION AND AWARD, 4. BILLS AND NOTES, 1. CHATTEL MORTGAGES. CRIMINAL LAW. DAMAGES, 2. DEATH. ELECTIONS, 2. EXECUTORS AND ADMINISTRATORS, 1-4. INTOXICATING LIQUORS, 1-8, 18, 19, 21. MASTER AND SERVANT, 15. NUISANCE, 3. RAPE. RECEIVING STOLEN GOODS. SALES, 2. STATUTE OF FRAUDS. WITNESSES.

1. The introduction in evidence of only a part of county court proceedings will not rebut the presumption of the regularity of the proceedings. *Johnston v. Frank* 180

2. Opinions derived from observation are admissible when, from the nature of the subject, better evidence cannot be obtained. *McKennan v. Omaha & C. B. Street R. Co*..... 281

3. Opinions based on observation of indications of pain and suffering, though observed some time after an injury, are admissible. *McKennan v. Omaha & C. B. Street R. Co*..... 281

4. Admission of evidence of all the circumstances under which a note was signed *held* not error, where part of the facts had been testified to by the opposite party. *Powell v. Deuchler* 296

5. In an action for permanent injuries, annuity tables may be received and considered with other evidence. *Jones v. Chicago G. W. R. Co*..... 306

6. A witness cannot testify to the contents of a paper which he holds in his hands. *Corn Exchange Nat. Bank v. Ochlare Orchards Co*..... 536

7. A statement, by a party to an accident, of a fact directly connected therewith and made contemporaneously with the accident is competent evidence as part of the *res gestae*, if within his knowledge. *Wenquist v. Omaha & C. B. Street R. Co*..... 554

8. The preponderance of evidence is not determined alone by the greater number of witnesses. *Jerich v. Union P. R. Co.* 767

9. An objection to the admission in evidence of an electric switch, on the ground that no foundation had been laid, may be overruled, where counsel in the opening statement pointed it out as the switch by which plaintiff was injured. *Henry v. City of Lincoln* 865

10. The Carlisle table of expectancy may be admitted in evidence in an action for injury resulting in permanent impairment of plaintiff's earning capacity; age and good condition of health at the time of the injury being shown. *Henry v. City of Lincoln* 865

Executors and Administrators. See HOMESTEAD, 3-4.

1. The burden is on plaintiff to prove his allegation that the appointment of an administratrix was void. *Johnston v. Frank* 190
2. Evidence, in a suit to set aside an administratrix's deed for fraud, *held* to sustain decree for defendants. *Johnston v. Frank* 190
3. An order for an administrator's sale of land will be presumed to have been recorded before the sale. *Johnston v. Frank*.. 190
4. In a suit to set aside an administrator's deed for fraud, the burden of proof is on the plaintiff. *Johnston v. Frank*..... 190
5. Land other than the homestead may be sold when necessary to pay decedent's debts. *Johnston v. Frank* 190
6. A claim by decedent's widow for money advanced in paying his debts may be allowed as a claim against his estate. *Johnston v. Frank* 190
7. An administrator *held* entitled to credit for payments made in good faith on prior liens from proceeds of a sale of mortgaged property, though sec. 1477, Rev. St 1913, requires such sales to be made subject to existing liens. *In re Estate of Vasek* 617
8. A pleading styled a "petition in equity," alleging grounds for disallowing items of credit and for additional debits in an administrator's report, will be treated, on appeal, as objections to the report. *In re Estate of Wilson* 780
9. Where an administrator wrongfully obtains credit for money as paid out for the estate, he may be charged with interest thereon. *In re Estate of Wilson* 780
10. An administrator is not chargeable with interest on money which he holds as administrator subject to the court's order, unless he received or should have received interest thereon. *In re Estate of Wilson* 780
11. An administrator cannot charge against the estate attorney's fees and expenses incurred in a contest with heirs as to misappropriation of funds of the estate. *In re Estate of Wilson* 780
12. An administrator *held* not entitled to an allowance for costs adjudged against him in litigation with the heirs. *In re Estate of Wilson* 780
13. An administrator is entitled to credit for the cost of his bond furnished by a bonding company under sec. 1500, Rev. St. 1913. *In re Estate of Wilson* 780

Executors and Administrators—*Concluded.*

14. Where, after apportionment of the estate, there is an appeal from an order correcting the administrator's account, the district court, after determining the debits and credits, should remand the cause for settlement of subsequent costs and final distribution. *In re Estate of Wilson* 780

15. Orders of the probate court adjusting accounts of an administrator are not final until his discharge and final settlement of his accounts. *In re Estate of Wilson* 780

16. On appeal from an order of the county court adjusting accounts of an administrator, the district court has jurisdiction of the matters from which the appeal is taken. *In re Estate of Wilson* 780

17. Where objection is made to certain items in the account of an administrator and trial is had as to those items only, on appeal the district court has jurisdiction only of the matters tried and appealed from. *In re Estate of Wilson* 780

18. Objections to the report of an administrator should on appeal be tried by the court, and not by a jury. *In re Estate of Wilson* 780

Fraud. See SALES, 1, 2. VENDOR AND PURCHASER.

1. Where representations as to value are based on special knowledge obtained by an invoice, and are believed and acted on by the buyer to his injury, they amount to actionable fraud. *Giles & Son v. Horner* 162

2. An instruction, in an action for breach of contract for the sale of goods, wherein defendant set up fraudulent representations, *held* misleading, as taking from the jury consideration of whether plaintiffs represented that they had invoiced the goods, thereby inducing defendant to buy. *Giles & Son v. Horner* 162

Fraudulent Conveyances. See HUSBAND AND WIFE.

1. Where a debtor sells his stock of implements without complying with the bulk sales law (Rev. St. 1913, sec. 2651), and dies intestate and insolvent, a creditor may have a receiver appointed to impound the stock, have it sold, and the proceeds applied to his claim. *Scheve v. Vanderkolk* 204

2. In a creditor's suit to impound goods sold in bulk in violation of the bulk sales law, the person in possession is a necessary party, but others through whose hands the goods have passed are not. *Scheve v. Vanderkolk* 204

Fraudulent Conveyances—*Concluded.*

3. In a creditor's suit to impound goods sold in violation of the bulk sales law, other creditors may intervene. *Scheve v. Vanderkolk* 204
4. Where a debtor sells goods in bulk without complying with the bulk sales law, and dies intestate and insolvent, creditors may impound the goods, without having first reduced their claims to judgment and having executions returned *nulla bona*, and without filing them in the probate court for allowance. *Scheve v. Vanderkolk* 204
5. A purchaser in possession of goods sold without compliance with the bulk sales law holds the property in trust for the seller's creditors. *Scheve v. Vanderkolk* 204
6. Fraud cannot be predicated on the transfer of the homestead interest by a debtor to his wife. *McCormick v. Brown* 545
7. A transfer by a debtor to his wife of the amount of the homestead exemption, and of her statutory interest in the remainder, is not a fraud against his creditors. *McCormick v. Brown* 545
8. Failure of a husband to pay his creditors from the proceeds of a sale of the homestead, as he had agreed, *held* not to bar the wife from claiming her interest in the proceeds of the sale. *McCormick v. Brown* 545

Gaming.

1. In an action for commissions and money advanced for purchases of grain on the Chicago board of trade for future delivery, plaintiff's right to recover *held* to depend on whether the principal intended to become an actual buyer. *Sunderland & Saunders v. Hibbard* 21
2. Evidence, in an action for commissions, *held* to show that the transaction was a gambling venture and speculation in the price of wheat in violation of sec. 8816, Rev. St. 1913, and contrary to public policy. *Sunderland & Saunders v. Hibbard* 21
3. Courts will not aid either party to a gambling transaction. *Sunderland & Saunders v. Hibbard* 21

Guardian and Ward.

Where a guardian is personally interested adversely to the estate of the ward, he must give bond on appeal, regardless of sec. 44, ch. 20, and sec. 234, ch. 23, Comp. St. 1911. *In re Williams* 726

Highways.

1. Where a highway has been established under the statute and used for more than ten years, the rule as to establishment by prescription will not be strictly applied. *Wecker v. Dommer* 728
2. Neglect to make a creek passable on the line of a highway *held* not of controlling importance in determining the establishment of the highway. *Wecker v. Dommer* 728
3. Evidence *held* to show that a traveled way was a public road. *Wecker v. Dommer* 728
4. Evidence, in an action for injuries caused by the negligent operation of automobiles, *held* to establish concurrent negligence by defendants, which rendered them jointly and severally liable. *Schweppe v. Uhl* 328

Homestead. See FRAUDULENT CONVEYANCES, 6-8. HUSBAND AND WIFE, 2. QUIETING TITLE.

1. Evidence, in a suit to set aside an administrator's deed for fraud, *held* to show that the land in question was not the homestead of decedent. *Johnston v. Frank* 190
2. The life estate in the widow in the homestead of her deceased husband and the estate in remainder in the children do not depend on occupancy. *Naiman v. Bohlmeyer* 551
3. An administrator's sale of a homestead to pay decedent's debts is void. *Naiman v. Bohlmeyer* 551
4. Where a widow buys the homestead at an administrator's sale, and afterwards conveys it by warranty deed, the grantee takes the widow's life estate, but the transfer is void as to the estate of the children. *Naiman v. Bohlmeyer* 551
5. On the death of either spouse holding the fee to the homestead, the homestead vests in the survivor for life; their minor children, merely by virtue of such relation, having no homestead interest therein. *Weddle v. Specht* 693

Homicide. See CRIMINAL LAW, 16.

Husband and Wife. See WILLS, 5, 6.

1. A wife's interest in her husband's real estate under ch. 49, laws 1907, cannot be alienated without her consent, nor subjected to his debts. *McCormick v. Brown* 545
2. Where a husband sells the homestead, and the wife in good faith repurchases it with her share of the proceeds and the proceeds of a loan on the property, her title is not subject to claims of her husband's creditors. *McCormick v. Brown*.. 545

Indictment and Information.

An indictment for larceny under sec. 9057, Rev. St. 1913, may also contain a count for receiving stolen property. *Egan v. State* 731

Infants. See JUDGMENT, 11.

Injunction. See MUNICIPAL CORPORATIONS, 7, 11. RAILROADS, 1. TAXATION, 11.

Innkeepers. See CONSTITUTIONAL LAW, 5.

1. Ch. 47, laws 1883, authorizes a guest at a hotel to sue the proprietor for injuries received through negligence of the proprietor or his servants. *Strahl v. Miller* 820
2. In an action by a hotel guest against the proprietor for injuries, an instruction on contributory negligence *held* proper. *Strahl v. Miller* 820
3. Where a guest is injured through negligence of an innkeeper or his employees, the innkeeper is liable therefor. *Strahl v. Miller* 820

Insurance. See COMPROMISE AND SETTLEMENT, 2. DEATH, 3.

1. The policy of insurance and the application *held* to constitute the contract. *Cilek v. New York Life Ins. Co*..... 56
2. Where the application was dated June 13, 1899, and the policy issued June 23, which gave a grace of one month to pay annual premiums, and the insured died July 23, 1906, without having paid the premium for that year, *held* that the policy had not lapsed. *Cilek v. New York Life Ins. Co*..... 56
3. Under sec. 17, ch. 53, laws 1903, a mutual accident association could limit the time within which suit might be brought on policies not less than one year from the accrual of the right of action. *Williams v. Western Travelers Accident Ass'n.* 352
4. Where the by-laws of a mutual accident association provided that no right of action should accrue within 90 days after receipt of proofs of loss, the question as to when the proofs of loss were received was for the jury. *Williams v. Western Travelers Accident Ass'n*..... 352
5. Where the evidence as to receipt of proofs of death within one year before commencement of action was conflicting, a general verdict for plaintiff will not be set aside on the ground that the action was commenced more than one year after receipt of such proofs. *Williams v. Western Travelers Accident Ass'n*..... 352

Insurance—*Concluded.*

6. Evidence, in an action against an accident association, whose by-laws provided that, for death from cerebral hemorrhage or heart failure, the amount payable should be limited to $500, *held* to sustain a finding that death did not result from either of such causes. *Williams v. Western Travelers Accident Ass'n* 352

7. Where the beneficiary was induced by fraud to accept $100 in satisfaction of a $4,000 policy, *held* that a return of the $100 was not a condition precedent to suit on the policy. *Williams v. Western Travelers Accident Ass'n* 352

8. Inconsistent provisions in an insurance policy will be construed most favorably to the assured. *Funke Estate v. Law Union & Crown Ins. Co* 412

9. Under the by-laws of a mutual benefit association, *held* that the vice-president, in the absence of the president, did not become a member of the board of directors, of which the president was *ex officio* a member. *King v. Physicians Casualty Ass'n* 637

10. Nonpayment of an assessment made by an illegal body will not authorize suspension of a member. *King v. Physicians Casualty Ass'n* 637

11. A provision in an insurance policy against liability in case of death by suicide *held* valid. *Hewson v. Royal Highlanders* 774

12. A contract limiting the liability of a beneficial insurance association to disabilities described in its constitution *held* valid. *Huff v. Grand Lodge, B. of R. T* 848

13. An agreement among members of a beneficial insurance association that a portion of the funds may be applied to the relief of members for whose disabilities no legal liability existed against the association *held* valid. *Huff v. Grand Lodge, B. of R. T* 848

Intoxicating Liquors.

1. The burden is on an applicant for a liquor license to prove that a sufficient number of freeholders signed his petition. *Benson v. Olson* 29

2. Evidence of petitioners *held* to establish *prima facie* that each was a freeholder and qualified to sign petition for liquor license. *Benson v. Olson* 29

3. Evidence *held* to establish that an applicant for a liquor license was a man of respectable character. *Benson v. Olson.* 29

Intoxicating Liquors—*Continued.*

4. Affidavit of a newspaper publisher *held* to prove *prima facie* that notice of an application for a liquor license was published as required by sec. 3845, Rev. St. 1913. *Benson v. Olson* 29
5. An affidavit of publication of notice of an application for a liquor license *held* sufficient, where no impeaching evidence was offered, to authorize the village board to act on the application. *Benson v. Olson* 29
6. Where, on the hearing of an application for a liquor license, the remonstrant makes no claim of the nonexistence of an ordinance authorizing licenses, its existence will be presumed. *Benson v. Olson* 29
7. Where one testified that he signed a petition for a liquor license, and produced a deed showing his full name to have the same initials as those signed to the petition, it was sufficient *prima facie* to identify him as the person who signed the petition. *Benson v. Olson* 29
8. An offer to prove that members of a village board were disqualified to act on an application for a liquor license, by showing that they had formed an opinion as to the character of the applicant, *held* properly refused. *Benson v. Olson*.. 29
9. It is no defense to an action on a saloon-keeper's bond for loss of support that the husband and father of plaintiffs was a drunkard before the sales alleged in the complaint. *Yechout v. Tesnohlidek* 387
10. A petition signed by 29 resident freeholders of a village containing 57 freeholders authorized the grant of a liquor license, where no remonstrance was filed prior to the hearing on the application. *Buckley v. Major* 417
11. Where an applicant obtained a license without objection and sold liquors until he received notice of the filing of a remonstrance, *held* that he had not thereby forfeited his right to a license. *Buckley v. Major* 417
12. The act of the territorial legislature of 1855 (laws 1855, p. 158) prohibiting the manufacture and sale of intoxicating liquors was repealed by the act of 1858 (laws 1858, p. 256). *State v. Excise Board* 421
13. A petition for a liquor license, which does not allege that the applicant is a man of respectable character and a resident of this state, is insufficient. *Eyre v. Doerr* 562
14. An amendment of defective petition for a liquor license will not validate prior proceedings taken thereon. *Eyre v. Doerr* 562

Intoxicating Liquors—*Concluded.*

15. No action can be taken on an application for a liquor license until a petition is filed containing the allegations provided by statute and signed by the required number of resident freeholders. *Eyre v. Doerr* 562

16. No liquor license can be issued unless an ordinance is first passed authorizing and regulating same. *Eyre v. Doerr*.... 562

17. An ordinance authorizing the sale of intoxicating liquors, without providing necessary regulations, is invalid. *Eyre v. Doerr* 562

18. Where a remonstrance filed with the village board alleges that there is no ordinance authorizing issuance of a liquor license, the applicant must prove the existence of such an ordinance. *Winterringer v. Sellen* 739

19. Oral testimony of a signer of a petition for a liquor license that he is the owner in good faith of certain specified real estate is *prima facie* evidence that he is a freeholder. *Winterringer v. Sellen* 739

20. Where a small tract of land is conveyed to several persons to qualify them as freeholders in petitioning for, or to prevent, the granting of a liquor license, such persons are not thereby qualified as freeholders. *Winterringer v. Sellen*.... 739

21. An applicant for a liquor license need not establish the ownership of real estate for each of the petitioners, as in cases of trial of titles. *Winterringer v. Sellen* 739

22. The petition for a liquor license must state the matters prescribed by statute, and must be signed by the requisite number of resident freeholders. *Winterringer v. Sellen* 739

23. Where a remonstrance is filed denying the allegations of the petition for a liquor license, the applicant must prove such allegations. *Winterringer v. Sellen* 739

Judgment. See COURTS, 1. LIMITATION OF ACTIONS, 10. MORTGAGES, 4. WILLS, 8, 9.

1. Where a judgment plaintiff has secured payment into court of a sum sufficient to satisfy his judgment, it is error to require the payment into court of further sums owing to defendant from third persons. *Montgomery v. Dresher* 104

2. When the federal court for the district has rendered a deficiency judgment in foreclosure, an action on such judgment may be maintained without leave in the courts of the state, regardless of secs. 8257, 8259, Rev. St. 1913. *Armstrong v. Patterson* 229

Judgment—*Concluded.*

3. The remedy for correcting a judgment after the term is limited to the grounds enumerated in sec. 602 of the code. *Girard Trust Co. v. Null* 324
4. Under the evidence, a motion to correct a decree after the term denied. *Girard Trust Co. v. Null* 324
5. Decree in a former suit *held res judicata* as to defendants' right to occupy the premises involved, for the time in controversy, on the terms and conditions under which they entered into possession. *Pankonin v. Gorder* 337
6. A judgment based on a false return of service may be set aside in equity. *Larr v. Stein* 488
7. Where, on defendant moving for a directed verdict, plaintiff does not ask to proceed further, but appeals from the judgment, he cannot afterwards litigate the issue. *Reams v. Sinclair* 542
8. A judgment in ejectment for defendant because of the insufficiency of a deed in law, *held* not a bar to a subsequent suit in equity based on a claim that such deed conveyed an equitable title. *Reams v. Sinclair* 542
9. Where a case is submitted on defendant's motion to direct a verdict, a judgment on the verdict so directed will be *res judicata* of the issues. *Reams v. Sinclair* 542
10. A judgment creditor, by filing a transcript of his judgment in the district court, does not obtain a lien on land previously conveyed by the debtor by a recorded deed. *Whitfield v. Clark* 626
11. Where, in partition, service is had on minor heirs represented by a guardian *ad litem*, the decree binds the minor heirs and cannot be collaterally attacked. *Weddle v. Specht*.. 693

Judicial Sales. See RAILROADS, 2, 4.

Jury. See TRIAL, 5-7.

1. To establish error for directing the sheriff to summon talesmen, instead of drawing from the regular panel, appellant must show that the regular panel had not been exhausted when such direction was made. *Haight v. Omaha & C. B. Street R. Co*..... 293
2. A juror, who was served with summons as a member of the board of trustees of a village, *held* not a party to a pending suit within sec. 8158, Rev. St. 1913, and subject to challenge for cause. *Krum v. Sullivan & Schaberg Transfer & Fuel Co*..... 491

Jury—*Concluded.*

3. Where a juror has consulted one of the attorneys, it is not ground for challenge for cause. *Krum v. Sullivan & Schaberg Transfer & Fuel Co* 491

4. The overruling of a challenge for cause *held* not an abuse of discretion, where the juror stated that he had a general prejudice against corporations, but no prejudice against defendant, and that he could try the case impartially. *Kadner v. Omaha & C. B. Street R. Co* 678

Landlord and Tenant. See PRINCIPAL AND AGENT, 2.

1. A contract of sale and lease, and a supplemental contract, *held* to constitute the contract between the parties. *Pankonin v. Gorder* 337

2. A mere notice to vacate leased land *held* not an eviction, where the tenant disregarded it and later voluntarily vacated the premises. *Braun v. Peet* 443

3. Failure of a landlord to furnish materials for repairs according to a lease is not an eviction, where the tenant was not damaged thereby. *Braun v. Peet* 443

4. In an action for damages for an eviction of which there is no proof, evidence of the landlord's purpose to eject the tenant is immaterial. *Braun v. Peet* 443

5. A landlord *held* liable to a tenant for injuries from a dangerous condition of a floor, known to the landlord, but not to the tenant. *Davis v. Manning* 658

6. Evidence, in an action for injuries from a defective floor, *held* to sustain verdict for plaintiff. *Davis v. Manning* 658

Larceny. See CRIMINAL LAW, 24

1. Unexplained possession of recently stolen cattle raises a presumption of guilt. *Kurpgeweit v. State* 713

2. In determining the inference to be drawn from the possession of recently stolen property, the jury should consider whether accused kept and sold it openly, where there is proof of those facts. *Brown v. State* 862

3. An instruction referring directly to accused's possession of stolen property, and requiring the jury to carefully consider it, where there is nothing else from which guilt can be inferred, should call attention to proof, if any, that he kept and sold the property openly. *Brown v. State* 862

Licenses.

Sec. 2695, Rev. St. 1913, requiring license fees for hunting and fishing to be paid to the state treasurer for the state school fund, and not the county school fund, *held* not violative of sec. 5, art. VIII of the constitution, relating to license moneys. *State v. Nickerson* 837

Liens. See JUDGMENT, 10.

Limitation of Actions. See ADVERSE POSSESSION. MORTGAGES, 5. MUNICIPAL CORPORATIONS, 14. TAXATION, 9.

1. Where payment of a just claim against a county, based on an invalid contract, was authorized by the legislature, limitations will not run against the claim until four years from the legislative authorization. *Gibson v. Sherman County*... 79
2. In an action by a county against the state by permission of the legislature under sec. 1180, Rev. St. 1913, *held* that the statute of limitations was no defense. *Lancaster County v. State* 95
3. Where the pleadings show the time that has elapsed since the cause of action accrued, the question of limitations is for the court. *Armstrong v. Patterson* 229
4. A civil action for assault and battery with circumstances of aggravation must be begun within one year, under sec. 13 of the code, and not four years, under sec. 12. *Borchert v. Bash* 593
5. Limitations run against a bill to declare a deed a mortgage, in favor of a grantee in possession, from the time such possession becomes adverse. *Minick v. Reichenbach* 629
6. Limitations do not run against a suit to remove a cloud from a landowner's title while he is in exclusive possession. *Essex v. Smith* 649
7. Limitations do not begin to run against a mortgagor's right to redeem from a void foreclosure sale until possession is taken under the mortgage or the foreclosure. *Essex v. Smith* 649
8. Where plaintiff amends his petition by stating a new cause of action, limitations run against the new cause of action until the amendment is filed. *Davis v. Manning* 658
9. Where an amended petition does not state a new cause of action, the filing of the original petition and service of summons therein stops the running of limitations. *Davis v. Manning* 658

Limitation of Actions—*Concluded.*

10. A domestic judgment is a specialty within sec. 10 of the code, and an action thereon is barred after five years from its rendition. *Armstrong v. Patterson* 871

Mandamus. See ABATEMENT.

A peremptory writ of mandamus will not issue to compel the doing of an act inconsistent with the petition and the alternative writ. *State v. Matson* 746

Marriage.

In a proceeding under sec. 2, ch. 25, Comp. St. 1911, to annul a marriage, plaintiff must prove that there was no subsequent voluntary cohabitation. *Kanaly v. Bronson* 322

Master and Servant. See APPEAL AND ERROR, 22. NEGLIGENCE, 9.

1. Where an experienced workman selects a dangerous method of doing work, instead of a safe one equally open to him, he cannot recover for consequent injury. *Creighton v. Keens*.. 212
2. An employer has the right to assume that an employee of mature years is possessed of the usual powers of observation, and such knowledge and judgment as is acquired by common experience. *Creighton v. Keens* 212
3. In an action for personal injuries, whether a foreman's peremptory order to an employee in a trench to raise alone one end of a heavy iron pipe constituted actionable negligence *held* a question for the jury. *Prediger v. Lincoln Traction Co*..... 315
4. A sister of decedent, to whom decedent contributed support, *held* to be a "dependent," and entitled to recover under the federal employers' liability act. *Richelieu v. Union P. R. Co.* 360
5. Evidence, in an action for personal injuries, *held* to sustain verdict for plaintiff. *Krum v. Sullivan & Schaberg Transfer & Fuel Co*..... 491
6. A servant who uses defective, though not dangerous, machinery in obedience to the master's order does not, as a matter of law, assume the risk of injury. *Usher v. American Smelting & Refining Co*..... 526
7. An instruction that a master is not required to furnish the newest or safest appliances, but that if the appliances were reasonably safe the master was not liable, *held* properly refused. *Usher v. American Smelting & Refining Co*..... 526

Master and Servant—*Concluded.*

8. In an action for injuries by a servant against his master and its foreman, a verdict for the foreman and against the master is not inconsistent, unless the plaintiff would not have received the injuries but for negligence of the foreman. *Usher v. American Smelting & Refining Co* 526

9. Evidence, in an action for personal injuries, *held* to sustain verdict for plaintiff. *Usher v. American Smelting & Refining Co* 526

10. Evidence, in an action for injuries received while operating a gasoline engine, *held* to show contributory negligence, barring recovery. *Nickel v. Butke* 539

11. Evidence *held* to authorize submitting to the jury whether defendant's inspectors misplaced the "controller," which was the primary cause of the accident. *Wenquist v. Omaha & C. B. Street R. Co* 554

12. A recital in an instruction that "defendant having plead that the injuries complained of were caused by the act of a fellow servant," *held* not misleading, in view of the whole instruction. *Wenquist v. Omaha & C. B. Street R. Co* 554

13. Where an employee is injured by the negligence of his employer, the contributory negligence of a fellow servant will not prevent recovery. *Wenquist v. Omaha & C. B. Street R. Co* 554

14. A person injured through the negligence of the driver of a horse may recover from the master of the driver. *James v. Hayden Bros* 619

15. An employer's oral promise to pay an employee his salary during a temporary disability may be shown by parol to be part consideration for a written release of liability for personal injuries. *Tylee v. Illinois C. R. Co* 646

16. An employee does not assume the risk of actionable negligence of his employer. *Frish v. Swift & Co* 707

17. Where an employee voluntarily goes outside the scope of his employment without the employer's knowledge and is injured, the employer is not liable. *Blackman v. Western Electric Co.* 710

18. Evidence, in an action for injuries, *held* to sustain verdict for plaintiff. *Jerich v. Union P. R. Co* 767

Mechanics' Liens.

In a mechanic's lien suit, findings *held* to dispose of issues raised by cross-petition for damages from fire caused by plaintiff's negligence. *Davis Co. v. Holmes* 861

Mortgages.

1. The court may order money of a defendant in the clerk's hands applied on a deficiency judgment in foreclosure. *Montgomery v. Dresher* 104
2. The mortgagee's remedy by foreclosure, in absence of a deficiency judgment, is exhausted by a sale of the property. *Eastern Banking Co. v. Robbins* 318
3. A junior mortgagee's right to a deficiency judgment is not lost because the entire proceeds of the foreclosure sale were applied on prior liens. *Eastern Banking Co. v. Robbins* 318
4. A decree foreclosing a mortgage cannot be revived after confirmation of the sale. *Eastern Banking Co. v. Robbins* .. 318
5. Right to a deficiency judgment *held* lost by laches. *Eastern Banking Co. v. Robbins* 318
6. After a foreclosure sale, the appraisement can be questioned only for fraud. *Bank of Salem v. Cornell* 610
7. Where objections to appraisement and confirmation of sale were without merit, it was not reversible error to strike them. *Tiehen v. Cornell* 615
8. A finding in a decree of foreclosure of the amount due will authorize the court, on confirmation of sale, to render a deficiency judgment. *Tiehen v. Cornell* 615
9. A deed absolute in form passes the legal title, though intended as security. *Minick v. Reichenbach* 629
10. Where the grantee under a deed given as security is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting. *Minick v. Reichenbach* 629
11. Evidence, in a suit to declare a deed a mortgage and to redeem, *held* to sustain decree for defendant. *Minick v. Reichenbach* 629

Municipal Corporations. See EMINENT DOMAIN. RAILROADS, 1, 2.

1. Whether a petition for the removal of a commissioner, under sec. 5308, Rev. St. 1913, in a city where registration laws are in force, is signed by the requisite 30 per cent. of the qualified electors must be determined from the voters' register. *State v. Berg* 63
2. Where any of the papers of a petition for the removal of a commissioner, under sec. 5308, Rev. St. 1913, have not been verified as required by sec. 5305, the city clerk should permit such verification, even after the petition has been filed. *State v. Berg* 63

Municipal Corporations—*Continued.*

3. The words "highest vote cast," as used in sec. 5308, Rev. St. 1913, mean the highest vote cast both for and against any candidate or proposition at the preceding general city election. *State v. Berg* 63
4. Sec. 5942, Rev. St. 1913, *held* not to authorize a railroad company to attain control of a city street for its right of way by condemnation or by contract with the city. *Omaha, L. & B. R. Co. v. City of Lincoln* 122
5. Under sec. 4471, Rev. St. 1913, city authorities can compel railroads to conform to street grades at any time established. *Omaha, L. & B. R. Co. v. City of Lincoln* 122
6. Courts will not interfere with established street grades unless the rights of others are unnecessarily injured. *Omaha, L. & B. R. Co. v. City of Lincoln* 122
7. Where the evidence is conflicting as to the advisability of a city sewerage system, the courts will not enjoin the grading and paving of the streets pursuant to the plan adopted, nor restrain the city from requiring railroad tracks along such streets to conform to such grade. *Omaha, L. & B. R. Co. v. City of Lincoln* 122
8. Where a city of the first class authorizes a railroad company to construct its road in a street in conformity to the grade then existing or afterwards established, and by subsequent ordinance establishes the grade, no other ordinance is necessary to compel the railroad to conform to the grade so established. *Omaha, L. & B. R. Co. v. City of Lincoln*.. 122
9. A city cannot deprive itself of control of its streets and the grades thereof. *Omaha, L. & B. R. Co. v. City of Lincoln* 122
10. Evidence, in a suit to disconnect land from a village, *held* to sustain decree for defendant. *Haney v. Village of Hyannis* 220
11. Evidence, in a suit to enjoin grading a street, *held* to sustain decree enjoining grading a portion within the curb line. *Hilger v. City of Nebraska City* 268
12. The mere establishment of a street grade does no damage for which a property owner may recover. *Hilger v. City of Nebraska City* 268
13. Where a street grade had been established and the street reduced nearly to grade, the work of leveling the street may be completed without an estimate, bids, and assessment of damages, required by sec. 8601, Ann. St. 1911. *Hilger v. City of Nebraska City* 268

Municipal Corporations—*Continued.*

14. Limitations will not begin to run against a lot owner's right to recover damages for grading a street until some action is taken by the city to change the street to grade. *Hilger v. City of Nebraska City* 268

15. Under secs. 4418, 4475, Rev. St. 1913, governing cities of the first class, regulation of entrances to basements through sidewalks is within the reasonable discretion of the mayor and council. *State v. Armstrong* 343

16. Permission by the mayor and council of Lincoln to construct a stairway to open in a sidewalk *held* not an abuse of discretion though such stairway restricted the use of the sidewalk. *State v. Armstrong* 343

17. Permission to construct a stairway to open in a sidewalk may be given by resolution without an ordinance. *State v. Armstrong* 343

18. Certain sections of the sidewalk ordinance of the city of Lincoln *held* not to prohibit openings in sidewalks for stairways and basement ways, in view of secs. 4418, 4475, Rev. St. 1913, and the practical construction thereof for many years. *State v. Armstrong* 343

19. A village has no inherent power to levy taxes. *Union P. R. Co. v. Heuer* 436

20. Ch. 20, laws 1885, as amended, construed with sec. 5108, Rev. St. 1913, *held* not to deprive villages of the power to levy taxes for water supplied under existing contracts or to maintain water-works. *Union P. R. Co. v. Heuer* 436

21. A city cannot lawfully sanction the maintenance of houses of prostitution. *Cooper v. State* 461

22. The duty of a city to keep its streets free from obstructions cannot be evaded or cast on another. *Cushman Motor Works v. City of Lincoln* 519

23. A city must use reasonable diligence to keep its streets free from obstructions. *Cushman Motor Works v. City of Lincoln* 519

24. Where a railroad company negligently constructs its road over a street under permit from the city, the city and the company are jointly and severally liable for resulting injury. *Cushman Motor Works v. City of Lincoln* 519

25. Under subd. 61, sec. 129, art. 1, ch. 13, Comp. St. 1909, it is incumbent on a city to see that a railroad company using its streets constructs and keeps in repair ditches, sewers and

Municipal Corporations—*Concluded.*

culverts along or under its tracks. *Cushman Motor Works v. City of Lincoln* 519

26. Procedure for submission of an ordinance under the initiative and referendum stated. *Eyre v. Doerr* 562

27. An ordinance adopted under the initiative statute does not go into effect until 30 days after its adoption. *Eyre v. Doerr* 562

28. It is actionable negligence to so drive a horse as to injure a pedestrian on the sidewalk. *James v. Hayden Bros.*. 619

29. The fact that unplatted agricultural land is incorporated in a village with the owner's tacit permission does not estop his grantee from proceeding under sec. 5090, Rev. St. 1913, to have it disconnected therefrom. *Joerger v. Bethany Heights* 675

30. A decree disconnecting land from a village will not be reversed, where there is no important mistake of fact or law. *Joerger v. Bethany Heights* 675

Names.

Under ch. 53, Rev. St. 1913, requiring sufficient and reasonable cause for a change of name, a decree is a matter of judicial discretion. *In re Taminosian* 514

Negligence. See CARRIERS. HIGHWAYS, 4. INNKEEPERS. MASTER AND SERVANT. RAILROADS, 6, 7. STREET RAILWAYS.

1. Where evidence of contributory negligence is sufficient to sustain a verdict for plaintiff, it is a question for the jury. *Jones v. Chicago G. W. R. Co*..... 306

2. An issue of negligence is for the jury, where the evidence will sustain a verdict for plaintiff. *Prediger v. Lincoln Traction Co*..... 315

3. Whether a son was his mother's agent, so that his negligence will be imputed to her, *held* a question for the jury. *Craig v. Chicago, St. P., M. & O. R. Co*..... 586

4. Where the evidence is conflicting, negligence and contributory negligence are for the jury. *Frish v. Swift & Co*..... 707

5. The issues of negligence and contributory negligence are for the jury, where the evidence is sufficient to sustain a verdict for plaintiff. *Fitzgerald v. Omaha & C. B. Street R. Co.* 856

Negligence—*Concluded.*

6. The issues of negligence and contributory negligence, where the evidence is conflicting, are for the jury, and their findings will not be set aside unless clearly wrong. *Henry v. City of Lincoln* 865

7. The fact that the relationship between the driver of a wagon and the person riding therein is that of mother and son does not, as a matter of law, make the negligence of the driver imputable to the mother. *Craig v. Chicago, St. P., M. & O. R. Co*..... 586

8. The coupling together of two wagons driven along a street *held* not negligence rendering the owner liable for death of a child who climbed on the connecting pole. *Zigman v. Beebe & Runyan Furniture Co*..... 689

9. Where a servant is placed in a position of sudden peril he should act as a person of ordinary prudence, whether the emergency arises from accident, acts of third persons, or negligence of the master. *Frish v. Swift & Co*..... 707

10. Where a person desiring to call an elevator in an unfinished building carelessly thrusts his head into the shaft and is injured, he cannot recover damages. *Wright v. Selden-Breck Construction Co*..... 840

11. It is not negligence *per se* to operate an elevator without a call bell in an unfinished building. *Wright v. Selden-Breck Construction Co*..... 840

New Trial. See APPEAL AND ERROR, 6.

1. A new trial should be allowed, where material uncontradicted evidence has been disregarded by the jury. *Hileman v. Maxwell* 14

2. Refusal of a continuance, whereby defendant was prevented from presenting its defense, *held* to be an abuse of discretion under sec. 1, ch. 39, laws 1911. *Richelieu v. Union P. R. Co*..... 360

3. A court of equity will grant a new trial where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript in time. *Ferber v. Leise* 795

4. Petition *held* to state a cause of action in equity for a new trial to preserve the right of appeal. *Ferber v. Leise* 795

Nuisance. See CONSTITUTIONAL LAW, 3.

1. A house maintained as a place for lewd men and women to congregate for immoral purposes is within the term "houses of lewdness," within ch. 63, laws 1911. *State v. Fanning*.... 224

Nuisance—*Concluded.*

2. Where a house is shown to be a place of lewdness, assignation or prostitution, the statute should be liberally construed in applying the remedy given. *State v. Fanning* 224
3. In an action to abate a house as disorderly, evidence of the general reputation of the house and of persons who frequent it is admissible. *State v. Fanning* 224
4. Evidence, in an action to abate a house as a nuisance, *held* insufficient to sustain decree for plaintiff. *State v. Fanning* 224

Parties. See FRAUDULENT CONVEYANCES, 2, 3.

1. Any person interested in a matter in litigation may become a party to the action. *Montgomery v. Dresher* 112
2. Where a party interested in a matter in litigation has become a party to the action, it is error to dismiss his petition of intervention prior to final determination of the action on the merits. *Montgomery v. Dresher* 112

Pleading. See ELECTIONS, 1. EMINENT DOMAIN, 2.

New matter of defense cannot be introduced under a general denial, but must be pleaded in the answer. *Yechout v. Tesnohlidek* 387

Principal and Agent.

1. The furnishing of an office to an agent as part of his compensation *held* not to create a power coupled with an interest. *Homan v. Redick* 299
2. Where an office is furnished to an agent as a part of his compensation, the relation of landlord and tenant does not exist. *Homan v. Redick* 299
3. Where a principal accepts the benefits of a settlement made by an agent, he is bound by an oral agreement made by the agent to procure such settlement. *Tylee v. Illinois C. R. Co.* 646

Principal and Surety.

1. Sureties on a contractor's bond *held* liable to mechanics and laborers for breach of a condition of his contract which required him to satisfy lawful claims of mechanics and laborers. *Sailling v. Morrell* 454
2. Where a clause in a surety bond of a contractor relieving the sureties from liability for nonperformance by the contractor was inserted by fraud or mistake, the bond may be reformed in equity. *Sailling v. Morrell* 454

Quieting Title.

Children of a deceased owner of a homestead *held* entitled, under secs. 6267, 6268, Rev. St. 1913, to sue to have their title determined and quieted during the lifetime of the widow. *Naiman v. Bohlmeyer* 551

Railroads. See MUNICIPAL CORPORATIONS, 4-9, 24, 25. SET-OFF AND COUNTERCLAIM.

1. Where a railroad company has constructed its tracks in a street pursuant to an ordinance, it may enjoin the city from an unreasonable removal of its tracks. *Union P. R. Co. v. City of Lincoln* 198
2. A master commissioner's deed to a railroad in a foreclosure suit conveys to the purchaser the rights acquired by the original owner under a city ordinance authorizing it to lay its tracks in a street. *Union P. R. Co. v. City of Lincoln*.... 198
3. In an action for destruction of crops from flooding caused by a railroad embankment, a requested instruction that plaintiff could not recover if he knew before he leased the land that it would be overflowed, *held* properly refused, where there was no evidence that he could have anticipated such results. *Boyd v. Chicago, B. & Q. R. Co*..... 238
4. A decree requiring the purchaser of a railroad at a receivers' sale to pay all liabilities incurred by the receivers includes damages for personal injuries to one of their employees. *Jones v. Chicago G. W. R. Co*..... 306
5. A petition pleading facts which entitle plaintiff to relief under the doctrine of the last clear chance *held* not insufficient because it did not state the doctrine. *Jones v. Chicago G. W. R. Co*..... 306
6. The speed of an engine on a track on which switchmen stand to give signals may be evidence of negligence, where the engine approaches without signal or warning. *Jones v. Chicago G. W. R. Co*..... 306
7. Railroads must use such care at grade crossings as is commensurate with the probability of danger. *Craig v. Chicago, St. P., M. & O. R. Co*..... 426
8. Where a railroad company takes a bond from a contractor conditioned substantially as provided by sec. 7006, Gen. St. of Kansas, it is not liable to a subcontractor. *Finegan v. St. Joseph & G. I. R. Co*..... 474
9. The fact that a railroad contractor's bond, in accord with sec. 7006, Gen. St. of Kansas, is not filed with the register of deeds of the county where the work was to be performed,

Railroads—*Concluded.*

will not entitle a subcontractor to sue the railroad company. *Finegan v. St. Joseph & G. I. R. Co* 474

10. In a suit against a railroad company in a county where a subcontractor resides, service of summons in another county on the contractor, who has given bond under sec. 7006, Gen. St. of Kansas, *held* not to give jurisdiction of the contractor. *Finegan v. St. Joseph & G. I. R. Co* 474

11. Evidence, in an action by a subcontractor against the contractor and a railroad company, *held* insufficient to sustain the action against the railroad company. *Finegan v. St. Joseph & G. I. R. Co* 474

12. A shipper cannot sue in the state courts for excessive freights collected on an interstate shipment, where the rate charged was the one authorized by the interstate commerce commission, and no order for reparation has been made by the commission. *Foster Lumber Co. v. Union P. R. Co* 669

Rape.

1. Evidence *held* to sustain a conviction of rape. *Hudson v. State* 47

2. Evidence of other acts of intercourse occurring shortly after the act charged *held* admissible. *Hudson v. State* 47

3. Testimony of prosecutrix as to other acts of intercourse, occurring shortly after the act charged, may be considered, if supported by other evidence of such acts. *Hudson v. State* 47

Receiving Stolen Goods. See CRIMINAL LAW, 26.

1. In a prosecution for receiving stolen property, the state must prove that the accused received the property, knowing it to have been stolen, and with intent to defraud the owner thereof. *Egan v. State* 731

2. Evidence that accused participated in the larceny *held* competent to prove that he knew the property was stolen. *Egan v. State* 731

Robbery.

Evidence *held* to sustain a conviction of robbery. *Curtis v. State* 397

Sales.

1. Plea of fraud in procurement of plaintiff's consent to rescission of a contract *held* not sustained by the evidence. *Rex Sanitary Closet Co. v. Duster* 87

Sales—*Concluded.*

2. Where defendant pleaded rescission of a contract sued on, and plaintiff replied that such rescission was procured by false representations, the burden was on plaintiff to establish that such representations were made and relied on. *Rex Sanitary Closet Co. v. Duster* 87

3. Where a jobber, after an inspection and rejection of lumber, attempts to sell it under the seller's direction to "use to best advantage," it will not amount to an acceptance. *Columbia River Door Co. v. Cady Lumber Co* 275

4. Evidence *held* to justify a purchaser in refusing to accept a shipment of lumber. *Columbia River Door Co. v. Cady Lumber Co* 275

5. A rejected offer to return a purchased chattel to the seller may be withdrawn by subsequent acts of the purchaser in using the property as his own. *Aegerter v. Ronspies* 656

6. Where a buyer planted potatoes warranted to grow, though in doubt as to their fitness, *held* that he did not thereby waive the warranty. *Backes v. Cook* 685

Schools and School Districts.

1. Where school trustees let a contract for the erection of a school building, and require a bond which they deem sufficient, they are not individually liable to mechanics and laborers, though the bond is not conditioned in the exact terms of sec. 7117, Ann. St. 1911. *Sailling v. Morrell* 454

2. To establish liability of school trustees for taking a bond not conditioned in the exact terms of sec. 7117, Ann. St. 1911, plaintiff must plead and prove that the action of the trustees was wilfully wrong. *Sailling v. Morrell* 454

3. A proposition to issue school district bonds must be submitted separately from any other not germane thereto. *State v. Matson* 746

4. Under sec. 6737, Rev. St. 1913, the selection of a schoolhouse site can be made only by a vote of two-thirds of the qualified electors present at a district meeting. *State v. Matson* 746

Set-Off and Counterclaim.

A counterclaim for damages for injury to the rolling stock of a railroad company, caused by the negligent act of the driver of a vehicle, cannot be asserted against the beneficiaries in an action under Lord Campbell's Act. *Craig v. Chicago, St. P., M. & O. R. Co.* 586

Statute of Frauds.

Parol evidence *held* admissible to prove an association between plaintiff and two others to procure a purchaser for land and to share the profits. *Kohl v. Munson* 170

Statutes.

In determining the legislative intent in the amendment of a statute, the course of legislation and existing conditions under the former statute may be considered. *Union P. R. Co. v. Heuer* 436

Street Railways. See CARRIERS.

1. In an action for injuries to a pedestrian at a street crossing, *held* that the questions of negligence and contributory negligence were for the jury. *DeNoon v. Lincoln Traction Co*.. 1
2. The public has a right to drive upon street car tracks, but not so as to interfere with the operation of the cars. *McKennan v. Omaha & C. B. Street R. Co*..... 281
3. While a motorman need not necessarily stop the car when he sees a person driving along the track, he must exercise reasonable care to avoid a collision. *McKennan v. Omaha & C. B. Street R. Co*..... 281
4. Where a motorman observes that a person driving along the track is unaware of his danger, he must use the care which an ordinarily prudent person would use to avoid a collision. *McKennan v. Omaha & C. B. Street R. Co*..... 281
5. Where the driver of a vehicle is injured while negligent, by impeding a street car, he cannot recover, unless those in charge of the car failed to exercise ordinary care to avoid a collision after realizing his danger. *McKennan v. Omaha & C. B. Street R. Co*..... 281
6. In an action for injuries received in a collision between a vehicle and a street car, instructions as to control and speed of the car *held* inconsistent with another instruction and prejudicial. *McKennan v. Omaha & C. B. Street R. Co*..... 281
7. The driver of a vehicle may attempt to cross a street railway track ahead of an approaching car at a street intersection, where he apparently has time to do so if the car is operated at its usual rate of speed. *Fitzgerald v. Omaha & C. B. Street R. Co*..... 856
8. Submission of a case in the double aspect of whether defendant failed to exercise ordinary care in controlling the speed of a car, or whether the motorman, after discovering decedent's peril, failed to use ordinary care, *held* not error. *Fitzgerald v. Omaha & C. B. Street R. Co*..... 856

Taxation. See COUNTIES AND COUNTY OFFICERS, 6-8.

1. A county is not an insurer of the safe-keeping of state taxes collected by it as trustee for the state. *Lancaster County v. State* 95

2. The revenue law requires that personal property shall be listed and assessed with reference to the quantity held or owned on April 1. *Wood v. McCook Water-Works Co*..... 215

3. A person who owns personal property subject to taxation when it is returnable for assessment for any year cannot escape liability for the tax for such year by any subsequent disposition of it. *Wood v. McCook Water-Works Co*..... 215

4. A tax deed is void, where the notice to redeem stated that the time for redemption would expire November 8, and the time in fact expired November 7. *Stewart v. Ridenour* 451

5. Under sec. 6437, Rev. St. 1913, construed with secs. 6442, 6447, 6456, *held* that a county board of equalization could increase an assessment July 1, though more than 20 days had expired after it met on June 10. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 510

6. A county board of equalization must equalize and correct assessments in time for the county clerk to prepare and forward an abstract of the assessment rolls to the state board on or before July 10 of each year. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 512

7. Personal property in the owner's possession at his residence in another state is not subject to taxation in Nebraska. *Preston v. Harlan County* 667

8. Evidence, in a suit to enjoin collection of personal taxes, *held* to show that plaintiff was not a resident of Nebraska. *Preston v. Harlan County* 667

9. Where the evidence required by sec. 214, art. I, ch. 77, Comp. St. 1903, shows that the tax deed is void, the owner may sue to quiet his title and to redeem at any time within ten years after the recording of the tax deed. *Lanigan v. Gilroy* 754

10. Where assessments are void and the landowner cannot ascertain the amount to be levied, he need not make a tender as a condition to equitable relief. *Orcutt v. McGinley* 762

11. An injunction to restrain collection of void irrigation taxes will not be denied because some have paid the void assessments. *Orcutt v. McGinley* 762

Telegraphs and Telephones.

1. A telegraph company is liable, under sec. 7406, Rev. St. 1913, for damages from failure to correctly transmit and deliver a message, notwithstanding a printed agreement to the contrary. *American Express Co. v. Postal Telegraph-Cable Co* 701
2. Where the sender of a message waives the contract and sues in tort, he can recover all damages from negligence, regardless of whether they might have been contemplated. *American Express Co. v. Postal Telegraph-Cable Co* 701
3. A telegraph company is liable for a mistake made by an employee of another company over whose lines the sending company transmitted the message. *American Express Co. v. Postal Telegraph-Cable Co* 701
4. In an action by an express company for failure to correctly transmit a message directing payment of money in plain words, *held* no defense that the company's rules required code words. *American Express Co. v. Postal Telegraph-Cable Co.* 701
5. Where the damages from failure to correctly transmit a message are proved by undisputed evidence and are liquidated, the court may direct a verdict for plaintiff. *American Express Co. v. Postal Telegraph-Cable Co.* 701

Torts.

An act wrongfully done by the cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. *Schweppe v. Uhl* 328

Trial. See APPEAL AND ERROR. BASTARDY, 1. BILLS AND NOTES, 2, 5, 6. BURGLARY, 3, 4. CARRIERS, 6. CHATTEL MORTGAGES, 3. CRIMINAL LAW. FRAUD, 2. INNKEEPERS, 2. MASTER AND SERVANT, 3, 7, 8, 11, 12. MECHANICS' LIENS. NEGLIGENCE, 1-6. RAILROADS, 3. STREET RAILWAYS, 1, 6, 8. TELEGRAPHS AND TELEPHONES, 5.

1. A general verdict is equivalent to a finding in favor of a party on all the issues and evidence. *Dore v. Omaha & C. B. Street R. Co* 250
2. Considerable latitude is allowed in the opening statement. *Yechout v. Tesnohlidek* 387
3. That counsel fails to prove all he expects to prove does not show that his opening statement was intentionally false. *Yechout v. Tesnohlidek* 387
4. Where a verdict was against one of two defendants and silent as to the other, it will be presumed that the jury found in favor of such other defendant. *Cox v. Ellsworth* 392

Trial—*Continued.*

5. A juror must not state to his fellow jurors material facts not in evidence, but within his personal knowledge. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* 536

6. Where a juror states in the jury room that he is a handwriting expert and can determine a disputed fact from an inspection of papers in evidence, it is not such misconduct as requires a reversal. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* 536

7. A juror's assertions of opinion and boasting of ability or expert knowledge do not constitute misconduct. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* 536

8. Where the court rules for defendant on a motion for a directed verdict, it may, in its discretion, allow plaintiff's request for leave to introduce further evidence. *Reams v. Sinclair* 542

9. Where the verdict contains proper findings on the issuable facts submitted, clearly indicating the judgment which should be pronounced, severable matter outside the issues may be rejected as surplusage. *Hallett v. Ransom* 643

10. Where a witness is absent from the state, his testimony given at a former trial is admissible. *Jerich v. Union P. R. Co*.... 767

11. Record *held* not to show misconduct of counsel in cross-examination of witnesses. *Jerich v. Union P. R. Co*..... 767

12. Where there is no evidence to sustain a judgment for plaintiff, the trial court should direct a verdict for defendant. *Furnas County v. Evans* 54

13. Where the evidence is insufficient to support a judgment for plaintiff, it is error to refuse a peremptory instruction for defendant. *Shlik v. Armour & Co*..... 101

14. An instruction that a party alleging fraud must produce stronger proof than would be sufficient to establish a mere debt, and that the burden is on him to overcome the presumption of honesty, *held* erroneous, as requiring more than a preponderance of evidence. *Giles & Son v. Horner* 162

15. All questions of fact on conflicting material evidence must be submitted to the jury. *Boyd v. Chicago, B. & Q. R. Co*.. 238

16. The credibility of witnesses and weight of testimony are for the jury. *Dore v. Omaha & C. B. Street R. Co*..... 250

17. Refusal of instructions covered by those given *held* proper. *Dore v. Omaha & C. B. Street R. Co*..... 250

Trial—*Concluded.*

18. Instructions should be construed as a whole. *Dore v. Omaha & C. B. Street R. Co* 250
19. An instruction stating the law on an issue established in plaintiff's favor is not erroneous, for failure to require a finding on that issue as a condition of granting plaintiff relief. *Jones v. Chicago G. W. R. Co* 306
20. A verdict in accord with the instructions as a whole will not be set aside because inconsistent with an isolated paragraph. *Prediger v. Lincoln Traction Co* 315
21. Where different conclusions may be drawn from the facts proved, the matter at issue is for the jury. *Craig v. Chicago, St. P., M. & O. R. Co* 426
22. Where the evidence is undisputed, the question at issue is for the court. *Craig v. Chicago, St. P., M. & O. R. Co* 426
23. The giving of an instruction defining the issues, which includes allegations of the petition not supported by evidence, is ground for reversal, if misleading. *Hutchinson v. Western Bridge & Construction Co* 439
24. Instructions should accord with the evidence. *Eisentraut v. Madden* 466
25. The court need not tell the jury the reason for limiting the issues by instructions. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* 536
26. Where the evidence is clearly insufficient to sustain a judgment for plaintiff, the court should direct a verdict for defendant. *Mitchell v. Bressler* 718
27. Instructions *held* to submit all the issues, including defense of set-off. *Haar v. Howard* 761
28. An instruction that the burden was on defendant to prove that the terms of a contract were as claimed in support of a set-off *held* proper. *Johnson v. Schmoller & Mueller Piano Co.* 765
29. An instruction that by a preponderance of the evidence is not necessarily meant the greater number of witnesses *held* not erroneous. *Jerich v. Union P. R. Co* 767
30. An objectionable clause will not render instructions erroneous, where, considered as a whole, they correctly state the law. *Henry v. City of Lincoln* 865

Vendor and Purchaser.

In a suit to cancel deeds procured by fraud, decree for plaintiffs affirmed. *Toop v. Palmer* 802

Venue. See RAILROADS, 10.

1. A change of venue should be denied where it does not appear that a fair and impartial trial cannot be had. *Boyd v. Chicago, B. & Q. R. Co* 238
2. Overruling of a motion for a change of venue will not be disturbed unless an abuse of discretion is shown. *Boyd v. Chicago, B. & Q. R. Co* 238
3. In passing on a motion for a change of venue, the district court is vested with a sound legal discretion. *Boyd v. Chicago, B. & Q. R. Co* 238

Waters. See TAXATION, 11.

1. Prior to 1889 (laws 1889, ch. 68) there was no method of claiming appropriation of water for irrigation except the construction of works and diversion of the water to a beneficial use, and the appropriator was not required to declare the amount of his claim until his right was challenged. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139
2. After the act of 1889 (laws 1889, ch. 68) an appropriator of water for irrigation whose right had been established by the completion of his works, and who desired to increase the amount, must proceed under that act. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139
3. An appropriator of water for irrigation prior to 1889 (laws 1889, ch. 68) was limited to the capacity of his works as then completed and the water diverted within a reasonable time. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139
4. Appropriators of water for irrigation subsequent to 1889 (laws 1889, ch. 68) must take notice of the rights of prior appropriators. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139
5. Where appropriators of water for irrigation construct their works subsequent to 1889 (laws 1889, ch. 68), prior appropriators are not estopped by their silence to assert the priority of their appropriation. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139
6. An appropriation of water for irrigation under laws 1877, p. 168, not determined by the state board of irrigation, *held* not affected by adjudications of subsequent appropriations under ch. 69, laws 1895, requiring the board to determine all appropriations of water recorded under prior acts, and ch. 153, laws 1911, extending such provision to all appro-

Waters—*Continued.*

priations. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

7. Under ch. 153, laws 1911, as amended in 1913 (Rev. St. 1913, sec. 3412), one who has constructed a canal to carry water for hire has made an appropriation which continues as a developing right for such time as is reasonable. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District*.. 139

8. Appropriations can only be made of water not previously appropriated. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

9. Prior appropriators need not notify subsequent appropriators of their rights. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

10. Appropriations of water for irrigation and appropriations for power purposes are equally protected under laws 1877, p. 168, and ch. 68, laws 1889. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

11. Appropriations of water for power purposes, completed under the act of 1877, became vested rights, and could not be taken away without compensation. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

12. Sec. 21, ch. 153, laws 1911, providing that no permit to irrigate lands shall be allowed without consent of the owners, applies to adjudications of appropriations under prior acts. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

13. In an adjudication in a case begun soon after ch. 153, laws 1911, took effect, the state board of irrigation properly allowed the applicant to obtain and file consent of the landowners while the proceedings were pending. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

14. Water can be appropriated only for a reasonable use. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

15. The right to use water appropriated must be exercised so as not to deprive the community of its use without benefit to any one. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

16. The state board of irrigation may, by regulations, allow subsequent appropriators such use of water as will not substantially deprive a prior appropriator of his beneficial use thereof. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

Waters—*Concluded.*

17. The determination by the state board of irrigation of the amount and priority of an appropriation of water is without prejudice to such subsequent regulations as will insure a proper use of the rights so determined. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

18. Evidence, in proceedings to determine priority of water rights, *held* to sustain the findings of the state board of irrigation as to the priority of plaintiff's rights. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

19. Under sec. 3408, Rev. St. 1913, providing for appeal, findings of the state board of irrigation on conflicting evidence will not be disturbed unless clearly wrong. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* 139

20. An upper proprietor cannot obstruct a stream so as to deprive a lower proprietor of water for domestic use, unless such use will deprive the upper proprietor of water necessary for his own use. *Norman v. Kusel* 400

21. Where an upper proprietor needlessly and wilfully deprives a lower proprietor of water for domestic purposes, he is liable for damages occasioned thereby. *Norman v. Kusel* 400

22. In the interest of good husbandry, the flow of surface waters along natural depressions through farm lands may be accelerated by artificial means. *Steiner v. Steiner* 449

23. A completed appropriation of water for power under the law of 1877 is a vested right, of which subsequent appropriators for irrigation must take notice; and the priority, if unchallenged, is not lost by failure to demand an adjudication under the law of 1895. *Gearhart & Benson v. Frenchman Valley Irrigation District* 764

Wills.

1. A will should be construed to carry out the intention of the testator as therein expressed, and considering the circumstances under which it was made. *Herter v. Herter* 260

2. The word "comp" in a will devising land in "comp" construed, and *held* to mean "company" and to include all the heirs. *Herter v. Herter* 260

3. Heirs will be disinherited only by express words or necessary implication and the disposition of the estate to another. *Herter v. Herter* 260

4. It will be presumed that the ancestor intended that his property should go in the channel of natural descent. *Herter v. Herter* 260

Wills—*Concluded.*

5. The wife cannot devise real estate so as to deprive her husband of the interest given him by sec. 1265, Rev. St. 1913. *Richardson v. Johnson* 749
6. Where a married woman devises her husband a less estate than is provided for him by sec. 1265, Rev. St. 1913, he may renounce the will and elect to take the estate given him by law. *Richardson v. Johnson* 749
7. No particular form of words is required to constitute an election under sec. 1271, Rev. St. 1913. *Richardson v. Johnson* 749
8. Where the county court had acquired jurisdiction to probate a will, failure to record a continuance by agreement *held* not to deprive the court of jurisdiction. *In re Estate of Vodvarka* 757
9. A motion to open a decree probating a will should set forth facts sufficient to show a *prima facie* defense against the probate of the will. *In re Estate of Vodvarka* 757

Witnesses.

1. One accused of crime cannot be cross-examined, and afterwards contradicted in respect to incompetent matters. *Jones v. State* 151
2. Accused cannot be cross-examined to impeach the contents of an involuntary confession. *Jones v. State* 151
3. A witness cannot be examined as to immaterial matters as a foundation for impeachment. *Corn Exchange Nat. Bank v. Ochlare Orchards Co*..... 536
4. Permitting answers to questions on redirect examination to explain opinions expressed on cross-examination *held* not error. *Fitzgerald v. Omaha & C. B. Street R. Co*..... 856